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No. 2306 861

United States
Circuit Court of Appeals
For the Ninth Circuit


SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,
Plaintiff in Error,

vs.

EDGAR E. CAMPBELL,
Defendant in Error.

Transcript of Record

*Upon Writ of Error to the United States District
Court for the Eastern District of Wash-
ington, Northern Division.*



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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

GRAVES, KIZER & GRAVES, Old National
Bank Building, Spokane, Washington,

Attorneys for Plaintiff in Error,

BELDEN & LOSEY, Old National Bank Build-
ing, Spokane, Washington, and

H. L. MAURY, of Butte, Montana,

Attorneys for Defendant in Error.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

vs.

Plaintiff,

SPOKANE & INLAND ELECTRIC RAILROAD
CO., a Corporation,

Defendant.

THIRD AMENDED COMPLAINT.

Plaintiff complains of the defendant and for third amended complaint herein, alleges:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Washington, and as such corporation is doing business in its corporate name of Spokane & Inland Electric Railroad Co., and was thus engaged on or about the 31st day of July, 1909, in its said business as a carrier of interstate commerce and carrier of passengers and freight between the City of Spokane, Washington, and the Town of Coeur d'Alene, Idaho.

2. That on or about the said 31st day of July,

1909, the plaintiff herein was employed by said defendant in the capacity of motorman, and as such employee was operating and running electric train known as Special No. 5 from the Town of Coeur d'Alene to the City of Spokane, State of Washington.

3. That said defendant, through its agents, officers and employees, so carelessly and negligently managed and operated its said trains that said defendant's officers, agents and employees caused improper running orders to be given to this plaintiff on said date, which said improper orders caused the accident and injuries hereinafter complained of.

4. That plaintiff on said date aforesaid was directed by the agents, officers and employees of said defendant to take his said train No. 5, and to proceed from said Town of Coeur d'Alene to the City of Spokane, and that plaintiff was given orders, directing him to meet and pass Regular Train No. 20 at the Town of Allen; that when rounding a curve and nearing the station of Gibbs, State of Idaho, which is a point between Coeur d'Alene City, Idaho, and the Town of Allen, this plaintiff saw a train coming from the opposite direction and running on the same track upon which said plaintiff's train was running, which said train plaintiff is now informed and believes was Regular Train No. 20.

5. That upon the coming into view of said train No. 20, plaintiff used all due diligence to

bring his motor upon said train No. 5 to a stop and standstill; that he duly applied the air brakes upon said motor, but owing to the defective condition of said air brakes, which said condition was wholly unknown to plaintiff, said brakes wholly failed and refused to act, and plaintiff's said train continued to rush forward at a tremendous rate of speed and a collision occurred, plaintiff's said train colliding with said Train No. 20, and which said collision caused the injuries hereinafter complained of.

6. That said accident and collision was directly due to the wrongful and negligent acts of the plaintiff's said superiors in the giving of said wrongful orders, and in their failure to furnish this plaintiff with a motor and train supplied with proper air-brakes in working condition.

7. That this plaintiff, after observing said train No. 20 upon the track, had plenty of time to have stopped his said train and prevented said collision if said air-brakes had been in good condition and in proper working order.

8. That by reason of said collision of said trains, aforesaid, said plaintiff was hurt, maimed and injured, so that he was unconscious for many days thereafter; that plaintiff was bruised, cut and injured both externally and internally; that both of his legs were broken by reason of which injury plaintiff's left leg is now six inches shorter than its normal condition and his right leg is three inches shorter than its normal condition; that plaintiff has entirely lost the hearing in his right

ear, and he is crippled for life to such an extent as to greatly hinder and impair his capacity for earning his livelihood; that plaintiff has, besides said injuries above set forth, undergone intolerable suffering and great pain of body and mind and will continue to suffer great pain of body and mind during the remainder of his life; that he will never again be able to earn his living without the assistance of others; that prior to the injuries herein complained of, plaintiff was a healthy, strong and able-bodied man, and at the time of said injuries was thirty-nine years of age and was capable of earning, and did earn, on an average of \$6.00 per day; that all of the negligent acts and things herein complained of against said defendant directly contributed to said plaintiff's injuries above mentioned, and all without fault or negligence on the part of this plaintiff, and that by reason of said wrongs and injuries aforesaid plaintiff has been damaged in the very great sum of \$50,000.00.

WHEREFORE, Plaintiff prays for judgment against said defendant for the sum of \$50,000.00, together with plaintiff's costs and disbursements herein expended.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
COUNTY OF SPOKANE. } ss.

Edgar E. Campbell, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the

above and foregoing third amended complaint, knows the contents thereof, and that the same is true as he verily believes.

(Signed) EDGAR E. CAMPBELL.

Subscribed and sworn to before me this 6th day of June, A. D. 1912.

(Signed) W. C. LOSEY,

(Seal) Notary Public for the State of Washington, residing at Spokane.

Endorsements: Due service of the within Third Amended Complaint, by a true copy thereof, is hereby admitted at Spokane, Washington, this 8th day of June, 1912.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Third Amended Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, June 15, 1912.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL, *Plaintiff,*
vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, *Defendant.*

ANSWER.

For answer to plaintiff's third amended complaint defendant:

I.

Admits each and every allegation made and contained in paragraphs one and two thereof.

II.

Denies each and every allegation made and contained in paragraph three thereof.

III.

Admits that at the time referred to in the fourth paragraph thereof, plaintiff acting as a motorman upon one of defendant's trains was proceeding with his train from Coeur d'Alene to Spokane; admits that at the Station of Gibbs, a point between Coeur d'Alene and Allan, regular train No. 20 on defendant's road came in view of plaintiff's train; admits that said train was coming from the opposite direction and running on the same track upon which plaintiff's train was running; denies each and every other allegation made and contained in the fourth paragraph thereof.

IV.

Admits that after plaintiff's train came in view of train No. 20 plaintiff's train continued to rush forward at a tremendous rate of speed, and that plaintiff's train collided with train No. 20, and admits that through such collision plaintiff was to some extent injured; denies each and every other allegation made and contained in the fifth paragraph thereof.

V.

Denies each and every allegation made and contained in the sixth paragraph thereof.

VI.

Denies any knowledge or information sufficient to form a belief as to whether plaintiff observed train No. 20 before coming in collision with it; admits that there was plenty of time for him to have stopped his train and prevented the collision with No. 20 after he might have observed train No. 20; denies each and every other allegation made and contained in the seventh paragraph thereof.

VII.

Admits that by reason of the collision of the trains plaintiff was injured; admits that both of his legs were broken in the collision; admits that prior to the time of the injury he was a healthy, strong and able-bodied man; denies any knowledge or information sufficient to form a belief as to the extent of his injuries other than the breaking of his legs; and denies each and every other allegation contained in the eighth paragraph thereof, and particularly denies that plaintiff was damaged in the sum of fifty thousand (\$50,000) dollars, or in any other sum, or at all, by reason of the matters and things alleged in the complaint.

FURTHER ANSWERING, and for an AFFIRMATIVE DEFENSE to said complaint defendant alleges:

I.

That upon July 31, 1909, and for several years prior thereto defendant owned and operated a line of electric railway between Coeur d'Alene, Idaho,

and Spokane, Washington; that over its road a number of regular trains were operated by a timetable, in accordance with the printed rules and regulations of the company, and special trains were also run thereover in accordance with such rules and regulations, and under telegraphic orders given by train dispatchers to the train operators; that upon the date aforesaid, and for several years prior thereto, plaintiff was and had been a motorman employed by plaintiff and regularly engaged in the operation of its trains, and that he then was thoroughly conversant with the manner of the operation of its road, with its rules and regulations, and with the duties required of its operatives.

II.

That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time table of defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders from defendant's train dispatcher in Spokane ordering it to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Coeur d'Alene ready to start upon a run to Spokane as

soon as there should arrive at Coeur d'Alene one of defendant's regular trains, known on its time table as No. 20, which was then due; that defendant, knowing that No. 20 was then due and that he had no right to leave Coeur d'Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Allan, and that when handing him such orders the conductor of plaintiff's train told him he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Coeur d'Alene yards and out on the line to Spokane, and at the Station of Gibbs, a distance of about one and one-half miles from Coeur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than eight hundred feet before the collision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, came to a full stop; that plaintiff could, if he had seen No. 20, have brought his train to a stop within a distance of 150 to 200 feet, and that the collision between the two trains was caused solely and entirely by plaintiff's disobedience of the rules, regulations and orders of the company, and by his reckless conduct in failing to pay heed to his surroundings, and to keep

a lookout upon the track ahead of him so as to observe No. 20 and bring his train to a stop, as he might have done had he have looked ahead of him at all.

FURTHER ANSWERING and by way of CROSS-COMPLAINT defendant alleges:

I.

That upon July 31, 1909, and for several years prior thereto defendant owned and operated a line of electric railway between Coeur d'Alene, Idaho, and Spokane, Washington; that over its road a number of regular trains were operated by a timetable, in accordance with the printed rules and regulations of the company, and special trains were also run thereover in accordance with such rules and regulations, and under telegraphic orders given by train dispatchers to the train operators; that upon the date aforesaid, and for several years prior thereto, plaintiff was and had been a motorman employed by plaintiff and regularly engaged in the operation of its trains, and that he then was thoroughly conversant with the manner of the operation of its road, with the rules and regulations, and with the duties required of its operatives.

II.

That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time table of

defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders from defendant's train dispatcher in Spokane ordering it to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Coeur d'Alene ready to start upon a run to Spokane as soon as there should arrive at Coeur d'Alene one of defendant's regular trains, known on its time table as No. 20, which was then due; that defendant, knowing that No. 20 was then due and that he had no right to leave Coeur d'Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Allan, and that when handing him such orders the conductor of plaintiff's train told him he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Coeur d'Alene yards and out on the line to Spokane, and at the Station of Gibbs, a distance of about one and one-half miles from Coeur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than eight hundred feet before the collision occurred, and the motorman of No. 20,

Endorsements: Service of the within Answer is hereby acknowledged this 5th day of November, 1912.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Filed in the U. S. District Court for the Eastern District of Washington, November 9, 1912.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

Answer to Third Amended Complaint.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

REPLY.

Plaintiff for reply to defendant's answer herein, admits, alleges and denies as follows:

1. Plaintiff for reply to paragraph 1 of defendant's affirmative defense, admits that on July 31, 1909, and for several years prior thereto defendant owned and operated a line of electric railway between Coeur d'Alene, Idaho, and Spokane, Washington; that over its road a number of regular trains were operated, and special trains run over

said road, and that upon July 31, 1909, and for several years prior thereto, plaintiff was, and had been, a motorman employed by plaintiff, and regularly engaged in the operation of its trains, but denies each and every other allegation, matter and thing contained in paragraph 1 of defendant's affirmative defense.

2. For reply to paragraph 2 of said affirmative defense, plaintiff admits that on July 31st, 1909, plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5; that upon said date plaintiff was in charge as motorman of said special train mentioned in said paragraph, and that same was standing in defendant's yards at Coeur d'Alene ready to start upon a run to Spokane, and that plaintiff was given orders to start upon his run to Spokane by the officers of the defendant, and that at the station of Gibbs, a distance of about one and one-half miles from Coeur d'Alene, his train came in collision with train No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of about 800 feet before the collision occurred, and that the motorman on No. 20, seeing plaintiff's train approaching, came to a full stop, but denies each and every other allegation, matter and thing contained in paragraph 2 of said affirmative defense.

The plaintiff for answer to the defendant's cross-complaint herein, admits, denies and alleges, as follows:

1. For answer to paragraph 1 of defendant's cross-complaint, plaintiff admits that on July 31, 1909, and for several years prior thereto, defendant owned and operated a line of electric railway between Coeur d'Alene, Idaho, and Spokane, Washington; that over its road a number of regular trains were operated by a time-table, and that upon said date and for several years prior thereto, plaintiff was, and had been, a motorman employed by plaintiff and regularly engaged in the operation of its trains, and admits that he was familiar with the printed rules and regulations of said defendant, but denies each and every other allegation, matter and thing contained in said paragraph 1 of said cross-complaint.

2. For answer to paragraph 2 of said cross-complaint, plaintiff admits that on July 31, 1909, he was acting as motorman upon a special train known as Motor 5; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Coeur d'Alene ready to start upon his run to Spokane, and that plaintiff started his train from said yards, and instead of stopping at a point in the yards of said defendant, continued his train on his way towards Spokane, passing out of the Coeur d'Alene yards and out on the line towards Spokane, and at the station of Gibbs, a distance of about one and one-half miles from Coeur d'Alene, his train came in collision with Train No. 20 on a straight track; that No. 20 was in full view of plaintiff's train

for a distance of about 800 feet before the collision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, came to a full stop, but denies each and every other allegation, matter and thing contained in said paragraph 2 of said cross-complaint.

3. For answer to paragraph 3 of said cross-complaint, plaintiff admits, that in such collision eighteen persons, who were passengers upon the train on which plaintiff was motorman, were killed and a very great number were seriously injured, many of them being maimed and disfigured for life, and that defendant owed a duty to said passengers, by itself and its employes, to exercise the highest degree of care and caution to protect them from injury; that as to the amount of money paid by the defendant, because of said injuries, plaintiff has no knowledge or information sufficient to form a belief, and therefore denies same, and further denies each and every other allegation, matter and thing in said paragraph contained.

Further answering and for an affirmative defense to said counter-claim, plaintiff alleges:

1. That on the 31st day of July, 1909, the plaintiff herein was, and for a long time prior thereto had been, employed by the defendant in the capacity of motorman, and as such employe was operating and running the different trains of the defendant, operating between the City of Spokane and the Town of Coeur d'Alene, and on the date and at the time hereinafter complained of.

plaintiff was operating Special Train No. 5 between the stations above named; that on said date said Motor 5 was furnished the plaintiff with which to make said run, and plaintiff at the time of the accident, hereinafter complained of, was operating said motor; that on said date plaintiff ordered and directed by the defendant to operate said train and motor from Coeur d'Alene to the City of Spokane, and while the plaintiff so operated said train, without fault, or negligence upon plaintiff's part, at a point on the line of said railway, near the Town of Gibbs, in the State of Idaho, came in contact with Train No. 20 on the main line of said defendant's track; that plaintiff prior to the time of said collision saw said train No. 20, after rounding a curve near said station, in ample time to have stopped his said train before colliding with said train No. 20, and plaintiff applied the air and brakes and took all and due precaution to bring his train to a stop and under control before colliding with said train No. 20, but because of the defects in the brakes and air equipment on plaintiff's train, said brakes and air refused to work, notwithstanding the fact that plaintiff took, used and employed all due means at his command to bring said train to a stop; that said equipment was furnished the plaintiff with said motor, and plaintiff, prior to the time of the accident complained of, believed said equipment to be in good working order, as he had a right to believe; that because of said defects in said equip-

ment, and the failure of the air upon said train to work so as to set the brakes, plaintiff was unable to bring his train to a stop, and a number of people, passengers upon plaintiff's said train and upon said train No. 20, were killed and injured; that if defendant was compelled to pay the sums of money mentioned in said cross-complaint of the defendant herein, it was because of its negligence in not furnishing plaintiff with proper and safe equipment with which to operate his said train, and any damages paid or injuries done to the passengers on either of said trains was because of the fault and negligence of the defendant, and without fault or negligence on the part of the plaintiff whatsoever.

WHEREFORE, Plaintiff prays that the defendant take nothing by its cross-complaint herein, and that plaintiff have judgment as prayed for in its complaint.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
COUNTY OF SPOKANE. } ss.

Edgar E. Campbell, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above styled action; that he has read the above and foregoing Reply, knows the contents thereof and that the same is true as he verily believes.

(Signed) EDGAR E. CAMPBELL.

Subscribed and sworn to before me this 24th day of February, 1913.

(Signed) E. H. BELDEN,
Notary Public for the State of Washington,
residing at Spokane.

Endorsements: Service of the within Reply, by a true copy thereof, admitted at Spokane, Wash., this 24th day of February, 1913.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Reply to Answer to 3rd Amended Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, April 28, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern
Division.*

No. 1471.

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff, and fix the amount of his damages at the sum of \$7500.00 (Seventy-five Hundred Dollars).

(Signed) S. BARGHOORN,
Foreman.

Endorsements: Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern
Division.*

No. 1471.

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

SPECIAL VERDICT.

Did the plaintiff Campbell receive, before leaving Coeur d'Alene, train order No. 53, reading as follows:

“Train Order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene Station.

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan."

Yes.

(Signed) S. BARGHOORN,
Foreman of the Jury.

Endorsements: Special Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern
Division.*

No. 1471.

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

SPECIAL FINDING I.

Q. Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?

Answer. Yes.

(Signed) S. BARGHOORN,
Foreman of the Jury.

Endorsements: Special Finding I.

Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern
Division.*

No. 1471.

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

SPECIAL FINDING II.

If you find that plaintiff left Coeur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident?

Yes.

(Signed) S. BARGHOORN,
Foreman.

Endorsements: Special Finding II.

Filed in the U. S. District Court for the Eastern
District of Washington, May 5, 1913.

W. H. HARE, Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

**MOTION FOR JUDGMENT NOTWITHSTANDING
VERDICT.**

Defendant moves the court to enter judgment in its favor herein, denying plaintiff relief and dismissing his action, notwithstanding the general verdict returned in his favor by the jury empaneled in this cause, upon the ground and for the reason that the special verdicts or findings returned by the jury in answer to the interrogatories submitted to them by the court are inconsistent with the general verdict in plaintiff's favor, and entitles defendant to judgment as herein moved.

Dated this 7th day of May, 1913.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within motion is hereby acknowledged this 7th day of May, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Motion for Judgment Notwithstanding the Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, May 7, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1471.

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND ELECTRIC RAILROAD
CO., a Corporation,

Defendant.

OPINION.

BELDEN & LOSEY, for Plaintiff.

GRAVES, KIZER & GRAVES, for Defendant.

RUDKIN, District Judge. This is an action to recover damages for personal injuries. At the time the plaintiff received the injuries complained of the defendant was a common carrier by railroad engaged in interstate commerce and the plaintiff was in its employ in such commerce. After setting forth the incorporation and business of the defendant and the employment of plaintiff as a motorman on the 31st day of July, 1909, the complaint contains the following allegations of negligence:

“4. That plaintiff on said date aforesaid was directed by the agents, officers and employees of said defendant to take his said train No. 5, and to proceed from said Town of Coeur d’Alene to the City of Spokane, and that plaintiff was given orders, directing him to meet and pass Regular Train No. 20 at the Town of Alan; that when rounding a curve and nearing the station of Gibbs,

State of Idaho, which is a point between Coeur d'Alene, Idaho, and the town of Alan, this plaintiff saw a train coming from the opposite direction and running on the same track upon which said plaintiff's train was running, which said train plaintiff is now informed and believes was Regular Train No. 20."

"5. That upon the coming into view of said train No. 20, plaintiff used all due diligence to bring his motor upon said train No. 5 to a stop and standstill; that he duly applied the air brakes upon said motor, but owing to the defective condition of said air brakes, which said condition was wholly unknown to plaintiff, said brakes wholly failed and refused to act, and plaintiff's said train continued to rush forward at a tremendous rate of speed and a collision occurred, plaintiff's said train colliding with said train No. 20, and which said collision caused the injuries hereinafter complained of."

"6. That said accident and collision was directly due to the wrongful and negligent acts of the plaintiff's said superiors in the giving of said wrongful orders, and in their failure to furnish this plaintiff with a motor and train supplied with proper air brakes in working condition."

"7. That this plaintiff, after observing said train No. 20 upon the track, had plenty of time to have stopped his said train and prevented said collision if said air brakes had been in good condition and in proper working order."

The answer, after denying the foregoing, sets forth the following affirmative defense:

“That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time table of defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant’s yards at Coeur d’Alene ready to start upon a run to Spokane as soon as there should arrive at Coeur d’Alene one of defendant’s regular trains, known on its time table as No. 20, which was then due; that defendant, knowing that No. 20 was then due and that he had no right to leave Coeur d’Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Alan, and that when handing him such orders the conductor of plaintiff’s train told him that he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Coeur d’Alene yards and out on the

line to Spokane, and at the station of Gibbs, a distance of about one and one-half miles from Coeur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than eight hundred feet before the collision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, came to a full stop; that plaintiff could, if he had seen No. 20, have brought his train to a stop within a distance of 150 to 200 feet, and that the collision between the two trains was caused solely and entirely by plaintiff's disobedience of the rules, regulations and orders of the company, and by his reckless conduct in failing to pay heed to his surroundings, and to keep a lookout upon the track ahead of him so as to observe No. 20 and bring his train to a stop, as he might have done had he have looked ahead of him at all."

This defense was denied by the reply and the case was tried before a jury. The jury returned a general verdict in favor of the plaintiff in the sum of \$7500.00 and also the following special verdict or findings:

1. "Did the plaintiff Campbell receive, before leaving Coeur d'Alene, train order No. 53, reading as follows:

‘Train order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene station.

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan.' ”

“Yes.”

2. “If you find that plaintiff left Coeur d’Alene in violation of his orders, then answer this question: ‘Was that leaving in violation of his orders the proximate cause of the accident?’

“Yes.”

3. “Were the air brakes on Campbell’s train immediately before the collision insufficient to enable Campbell to control the speed of the train?

“Yes.”

The defendant has now moved the court for judgment in its favor notwithstanding the general verdict in favor of the plaintiff on the ground and for the reason that the special verdict or findings returned by the jury in answer to the interrogatories submitted to them by the court are inconsistent with the general verdict.

In support of the motion for judgment counsel have discussed the testimony in the case at length for the purpose of showing that the defective air brakes could not have been the proximate cause of the accident, and even with a view of showing that the defect, if such existed, was not the result of negligence on the part of the defendant company. But on a motion of this kind the court may not look to or consider the testimony for any purpose. As said by the Supreme Court of New Jersey in *Seabright v. N. J. Cent.*, 60 Atl., 64:

“The pleadings and postea show that the locus

in quo is a part of New street, a regularly laid out highway in the borough of Seabright, and that the defendants have taken possession of it and are excluding the public from its user. No vacation of the highway appears, and ordinarily, therefore, the plaintiffs would be entitled to judgment on these facts. The defendants contend that, notwithstanding the above facts, the borough authorities have been guilty of such conduct in the premises as to estop them from disturbing the defendants in their exclusive possession of the highway, and in support of this contention the court is referred to certain evidence submitted at the trial. But this plainly can not be considered by us. In determining what judgment shall be entered upon a special verdict, nothing can be looked at by the court except the pleadings and the *postea*. Arch. Prac., Vol. 2, 215. Tidd's Prac., Vol. 2, 598. The *postea* discloses no finding of the existence of such an estoppel as a fact. The most that can be said in that respect is that it contains some evidence of the fact. The evidence from which a fact might have been found, without any finding of the fact itself, is valueless in a special verdict. We have not, therefore, felt it necessary to consider the question discussed by counsel, whether an estoppel in pais may ever, under any circumstances, be asserted against the public."

"The plaintiffs are entitled to judgment on the *postea*."

Limited, then, as I am by the pleadings and the

special verdict, can it be said as a matter of law that the special finding, that the disobedience of orders on the part of the plaintiff was the proximate cause of the accident, defeats a recovery under the Employers' Liability Act? I am of the opinion that it can not. The air brakes and other equipment required by the Safety Appliance Act are for use in an emergency, whether that emergency arises from unavoidable accident or from neglect. A collision does not of necessity result from disobedience of orders on the part of an employee, and if the employee who has been guilty of such disobedience is unable to avoid an impending collision because of defective equipment furnished by the master it surely can not be said that the defective equipment in no wise contributed to the accident. If it did contribute a liability exists under the act in question.

In *Grand Trunk Western Railway Co. v. Lindsay*, 201 Fed., 836, 844, the court said:

"If, under the Employers' Liability Act, plaintiff's negligence contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the negligence resulted 'in whole or in part' from defendant's negligence the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence, for his act was the same act,

by whatever name it be called. It is only when plaintiff's act is the sole cause * * * when defendant's act is no part of the causation * * * that defendant is free from liability under the act."

To the same effect see *Louisville & N. R. Co. v. Wene*, 202 Fed., 887.

Being, therefore, of opinion that the special finding of the jury is not of itself sufficient to defeat a recovery under the Employers' Liability Act the motion for judgment notwithstanding must be denied, and it is so ordered.

Endorsements: Opinion Denying Motion for Judgment Notwithstanding Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, August 9, 1913.

W. H. HARE, Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

ORDER.

Defendant's motion for judgment upon the special findings of the jury notwithstanding the general verdict returned in plaintiff's favor is denied,

to which ruling the defendant excepts and its exception is allowed.

Dated this 15th day of August, 1913.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order Denying Motion Notwithstanding Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, August 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

PETITION FOR A NEW TRIAL.

Defendant prays the court to grant it a new trial in the above entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict, such insufficiency consisting in the following matters, to-wit:

(a) The evidence showed and the jury have found that plaintiff was injured by reason of his violation of his orders in leaving Coeur d'Alene

without having orders against regular train No. 20.

(b) The evidence shows and the jury have found that such violation of orders was the proximate cause of plaintiff's injury.

(c) The evidence shows that there was no defect or insufficiency in any particular in the brakes on plaintiff's train.

(d) The evidence shows that though it be held there was some evidence that the brakes upon plaintiff's train were defective or insufficient in any way, nevertheless such defect or insufficiency was not the proximate cause of plaintiff's injury.

2. That the verdict in plaintiff's favor is against the weight of the evidence and should be set aside for that reason.

3. The verdict in plaintiff's favor is against the weight of the evidence and contrary to the special findings made by the jury.

4. Errors in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(a) The admission of evidence relating to the failure of the brakes to work.

(b) The giving of that portion of the charge to the jury which reads as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision and that the defective condition of the air brakes was a direct

and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

(c) The giving of that portion of the charge which authorized the jury to inquire whether the proximate cause of the collision in which plaintiff was injured was the disobedience of orders by the plaintiff, or whether it was defective air brakes.

(d) The giving of that further portion of the charge by which there was submitted to the jury the question of whether the defective condition of the air brakes, if they were found to be defective or out of repair, was the direct or proximate cause of the collision as the term was theretofore defined to them.

(e) The giving of that portion of the charge which, after having stated that the one question presented to them was whether the plaintiff took his train out in violation of the orders, then proceeded as follows:

"The next question for your consideration will be this: 'Were the air brakes on this motor and train defective?' If you find from a preponderance of the testimony that they were, the next question is: 'Was such defect the direct and proximate cause of the injury to the plaintiff?' If you are satisfied on both of these question, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff and it only remains to assess the amount of his recovery."

(f) The refusal of the court to give the following charge requested in writing by defendant, to-wit:

“I charge you that if the plaintiff left Coeur d’Alene in violation of the orders which he had, recklessly or willfully or with such gross negligence as would amount to recklessness or willfulness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely on the brakes and in that event your verdict should be for the defendant.”

(g) The refusal of the court to give the following charge requested in writing by the defendant, to-wit:

“If you find from the evidence that the plaintiff left Coeur d’Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant.”

(h) The refusal of the court to give the following charge requested in writing by the defendant, to-wit:

“If you find that before leaving Coeur d’Alene plaintiff received train order No. 53 reading as follows:

“Train Order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene Station

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 East at Alan”

and left Coeur d’Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant.”

The foregoing petition will be heard upon the pleadings and papers on file and upon the minutes of the court.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within Petition for a New Trial is hereby acknowledged this 18th day of August, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Petition for New Trial.

Filed in the U. S. District Court for the Eastern District of Washington, August 19, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1471.

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILWAY
CO., a Corporation,

Defendant.

OPINION.

BELDEN & LOSEY, for Plaintiff.

GRAVES, KIZER & GRAVES, for Defendant.

RUDKIN, District Judge. This is an action to recover damages for personal injuries. After numerous motions and opinions by the court the case has now reached its final stage on motion for a new trial. The facts deemed material to a consideration of the pending motion are as follows:

The defendant owns and operates an electric railway between the city of Spokane, in the state of Washington, and the city of Coeur d'Alene in the state of Idaho, and is engaged in interstate commerce. At the time of receiving the injuries complained of the plaintiff was in the employ of the defendant as a motorman on one of its electric trains and as such was employed in interstate commerce. On the 31st day of July, 1909, Special Motor No. 5, operating between Coeur d'Alene and Spokane, in charge of the plaintiff as motorman, collided with Regular Train No. 20, operating be-

tween Spokane and Coeur d'Alene, at a station called Gibbs, in the state of Idaho, causing the injuries for which a recovery is now sought.

The complaint alleged that this collision was the result of negligence on the part of the defendant, first, in giving orders to meet Regular Train No. 20 at a station called Alan, west of and beyond the point of collision; and, second, because of the failure of the air brakes to perform their functions when the collision became imminent. The answer denied the negligence charged in the complaint and alleged affirmatively that under the rules of the company it was the duty of the plaintiff to remain at Coeur d'Alene City with his train until after the arrival of Regular Train No. 20 at that place and that his failure so to do was the cause of the collision and his consequent injury. The jury found against the plaintiff as to the first charge of negligence and in his favor as to the second. The jury further found that the plaintiff disobeyed orders as charged in the answer and that such disobedience of orders was the proximate cause of the accident. Aside from the finding of the jury the testimony showed all but conclusively that the plaintiff was guilty of gross negligence, which not only contributed directly to his own injury but caused the loss of many lives and great financial loss to his employer as well. It further appeared that each of the colliding trains could be seen by the motorman in charge of the other for a distance of eight hun-

dred feet before the collision; that Regular Train No. 20 came to a full stop before the two trains collided, and that the train in charge of the plaintiff could have been stopped within a distance of not to exceed three hundred feet by a proper application of the air brakes if the brakes were in proper working order. The plaintiff and two railroad men standing in the door of the motor-man's cab testified that as soon as the plaintiff discovered the other train approaching he immediately applied the emergency brakes; that the brakes held fast while the train was traveling forty or fifty feet and that the train was gradually coming to a stop when the brakes released permitting it to glide on to its destruction. Witnesses on the part of the defendant on the other hand, who were passengers on the train with one exception, testified that the application of the air brakes and the clash of the collision were almost simultaneous. Under the foregoing facts the defendant makes four points in support of its motion for a new trial. First. That the verdict is against the weight of the evidence. Second. That the Safety Appliance Act does not extend to or include trains operated by electric motors. Third. That under the latter act contributory negligence is a complete defense; and lastly, that under the Employers' Liability Act it was incumbent on the plaintiff to show that the defect or insufficiency in cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other

equipment resulted in whole or in part from the negligence of some officer, agent or employee of the carrier, and that no such negligence was proved.

1. The air brakes in question were of standard make and in common use; they had at all times worked perfectly up to the very moment of the accident so far as the testimony discloses, and when we consider their construction and mode of operation, coupled with the fact that no claim of defective equipment was made of record until the filing of the fourth amended complaint many months after the accident we are at least led to suspect the bona fides of this claim. Nevertheless the charge is supported by the direct and positive testimony of three unimpeached witnesses and the court does not feel at liberty to disregard their testimony. True, their opportunity for observing conditions and forming a correct judgment as to facts was not of the best in view of the confusion and excitement that must have arisen in the face of the impending collision, but the witnesses for the defendant with one exception were confronted with the same lack of opportunity. They had little to guide them in forming an opinion except the mere lapse of time between the application of the brakes and the ensuing collision and this is admittedly a very unsafe and uncertain guide in a crowded train where nothing out of the ordinary is expected or anticipated. But whatever doubts may exist in the mind of the court as to the true

facts in the case I am of opinion that I would be usurping functions not conferred by law should I interfere with a verdict thus supported.

2. The original Safety Appliance Act of 1893 applied only to locomotive engines and engineers on locomotives drawing interstate trains, and these terms are doubtless not broad enough to include electric motors and motormen. But the amendment of 1903 declared that the provisions and requirements of the acts relating to train brakes, automatic couplings, grab irons and the height of drawbars should be held to apply to all trains, locomotives, tenders and *similar vehicles* used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars and *similar vehicles* used in connection therewith, with certain exceptions not deemed material here, and in view of the liberal construction placed upon these acts by the courts in order to effectuate the congressional intent I am of opinion that the terms of the amendatory act are broad enough to include electric motors and the motormen in charge. Certainly the electric motor on the modern train subserves the same purpose as the locomotive engine, the motorman discharges substantially the same duties as the engineer, and the electric motor is to all intents and purposes a *similar vehicle* within the meaning of the law.

3. The finding of the jury that the plaintiff was guilty of contributory negligence is no doubt a complete bar to an action to recover damages for

his injuries either at common law or under the Safety Appliance Act where contributory negligence is recognized as a defense.

4. It is the contention of the defendant that the Employers' Liability Act of 1908 simply imposes additional duties upon common carriers, or changes the substantive law, but does not change the law or rules of evidence. But it is almost universally held that the violation of a statutory duty is negligence *per se* and if it be such it must be negligence on the part of those officers, agents or employees who are charged with the duty of complying with the statutory requirements. It has uniformly been held by the courts of late years that the duty imposed by the Safety Appliance Act is an absolute and unconditional one, regardless of the degree of care the carrier may have exercised in his attempt to fulfill the requirements of the law.

St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281.

C., B. & Q. Ry. v. United States, 220 U. S. 559.

Delk v. St. Louis & San Francisco R. R., 220 U. S. 580.

The use, therefore, by the defendant company of an electric motor not equipped with a power drive wheel brake so that the motorman driving the train could control its speed was negligence *per se* upon the part of its representatives charged with the duty of meeting the statutory obligation.

The objections to instructions given and to the refusal to give instructions requested is disposed of by what has already been said, and while the questions presented are not free from doubt I am of opinion that the motion for new trial should be overruled and it is so ordered.

Endorsements: Opinion Denying Petition for New Trial.

Filed in the U. S. District Court for the Eastern District of Washington, October 11, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND ELECTRIC RAILWAY
COMPANY,

Defendant.

ORDER.

Defendant's petition for a new trial is denied. Defendant excepts, and exception is allowed. Defendant may have until December 1, 1913, in which to serve and file its proposed bill of exceptions. Settlement of same to be made thereafter at earliest convenience.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order Denying Petition for New Trial and Order allowing defendant until December 1, 1913, to file Proposed Bill of Exceptions.

Filed in the U. S. District Court for the Eastern District of Washington, October 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILWAY
COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause having heretofore, on the 28th day of April, A. D. 1913, come regularly on for hearing in the above entitled court, and plaintiff appearing in said action by its attorneys, Belden & Losey, and H. L. Maury, and the defendant appearing by its attorneys, Messrs. Graves, Kizer & Graves, and upon the calling of said cause, the attorneys for the respective parties answered ready for trial, and thereupon, evidence was given and introduced, on behalf of the plaintiff and the defendant, and upon the conclusion of the evidence, the Court instructed the jury, and the jury re-

tired to consider their verdict, and thereafter, and on, to-wit, the 5th day of May, 1913, said jury returned and filed in this Court its verdict in favor of the plaintiff and against the defendant, and assessing the damages of the plaintiff, against the defendant, in the sum of Seventy-five Hundred (\$7500) Dollars.

Thereafter, the defendant Spokane & Inland Empire Railway Company filed its motion for judgment herein, non obstante veredicto, and said motion having been duly considered by this Court, and having been overruled by this Court, and there being no other motion pending before this Court, or reason why judgment should not be entered in accordance with said verdict,

IT IS NOW HERE ORDERED AND ADJUDGED, that the plaintiff, Edgar E. Campbell, do have and recover of and from the defendant Spokane & Inland Empire Railway Company, the principal sum of Seventy-five Hundred (\$7500) Dollars, with interest thereon at the legal rate from the 5th day of July, A. D. 1913, together with plaintiff's costs and disbursements herein, taxed at \$....., and that execution may issue therefor herein.

DONE IN OPEN COURT, and dated this 15th day of August, A. D. 1913.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Due service of the within Judgment, by a true copy thereof, is hereby admitted

at Spokane, Washington, this 14th day of August, 1913.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Judgment.

Filed in the U. S. District Court for the Eastern District of Washington, August 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

STIPULATION.

Defendant may have until December 1, 1913, to serve and file its proposed bill of exceptions, settlement of same to be made thereafter at earliest convenience of the court.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Stipulation extending time to file Proposed Bill of Exceptions until Dec. 1, 1913.

Filed in the U. S. District Court for the Eastern District of Washington, October 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above entitled cause came regularly on for trial in the above entitled court on Monday, April 28, 1913, before the Honorable F. H. Rudkin, judge presiding, plaintiff appearing in person and by his attorneys, Messrs. Belden & Losey and H. L. Maury, Esq., and the defendant being represented by its counsel, Messrs. Graves, Kizer & Graves, whereupon the following proceedings were had:

A jury was impaneled and sworn according to law, and thereupon the plaintiff, to sustain the issues upon his part, offered the testimony of the following witnesses as his evidence in chief.

(Testimony of Edgar E. Campbell)

The plaintiff, called as a witness in his own behalf, after being first duly sworn, testified as follows:

I went to work for the defendant company in May, 1906, as a brakeman. During the same year I was promoted to be a motorman on its electric trains. On the morning of July 31, 1909, I went to work at 6:30 a. m. The train I was assigned to take out was made up of Motor No. 5, with two trailers attached, making a three-car train. On the afternoon of that day I arrived in Coeur d'Alene with my train from Spokane about 4:20. I wyeed my train in the machine shops and brought it in position to return to Spokane. I then received written orders for the running of my train from Coeur d'Alene to Spokane, and oral orders from the conductor, Whittlesey. I was in the cab and he said, "All right, go ahead; get out of town." He gave me my written orders when he first approached the cab in front of the motor. I have not those orders, do not know what became of them, and am unable to produce them. I was injured shortly after those orders were handed to me, and was unconscious for about a week. I started to read the orders to the conductor, and he said, "All right; get out of town." I finished reading him my orders, put them in my pocket, and started. The conductor is my superior, but he cannot give you orders to pull out unless you have orders to pull out. The written order I received from Mr. Whittlesey said that Motor 5

(Testimony of Edgar E. Campbell)

would run special Coeur d'Alene to Spokane and would meet No. 20 at Allan; that was my written order handed me by Conductor Whittlesey. Immediately after he had handed me the orders and I had started to read them to him he told me to pull out, and I proceeded west toward Spokane. Those orders were received at Coeur d'Alene, Idaho, and were to run to Spokane, Washington. As I passed the wye at Coeur d'Alene and got on the main line, I looked at my time table to make my meet on No. 22. Then I turned around and turned the cushion over on top of the compressor, and just as I turned around again I saw No. 20 coming. After leaving Coeur d'Alene, I first took down my time card to ascertain where we would meet No. 22, and then changed the cushion because the compressor was hot to sit on. Upon seeing the approaching train, I did what we term in railroading "dynamite her." I gave all the air I had. It caught hold and was making a stop very nicely when all of a sudden it released, and the train shot forward. I then reversed my motors, and I suppose it cleaned the line because I did not have any power immediately after I reversed. There was no hand brake in the cab. If the air had worked properly and held when the first application was made, I could have stopped my train before running into the other train. If the brakes had been working properly, I could have stopped my train in about 600 feet, probably less than that.

(Testimony of Edgar E. Campbell)

I was running about 30 miles an hour when I applied the air. There were people standing back of me. I don't know whether they were watching me or not. Just as I turned around, looking forward after having fixed the cushion, I saw the other train coming, and just as I started to turn off my power somebody back of me hollered "Give her the big hole." That is what I spoke of a while ago, "dynamtiing," giving all the braking power you have is termed the "big hole," emergency. When I first applied the air it took hold and held for approximately, I should judge, 35 or 40 feet, then let loose; everything released without any action on my part. After the air released, there was nothing I could do to stop my car after reversing it. I held my hand on the jack. The practical way of operating the car in the case of emergency where you have occasion to reverse a motor is to throw your jack first because the momentum of your car after you throw your reverse throws practically enough momentum there to take hold a little bit. I pulled my jack first, then pulled my reverse back, and after I did that I saw we were getting pretty close together and I gave my car and the controller a point and threw in my jack to get my power from the trolley wire to cause friction in my motor to get my motors in the reverse bearing. I was in that position when we struck the other train. There was nothing else I could do to bring the train to a stop. If

(Testimony of Edgar E. Campbell)

there had been a hand brake there I probably could have checked the speed of the train to a certain extent, but I could not say that I could bring it to a stop with the amount of weight I had behind me. I judge there were about 300 passengers on the train, the three cars being jammed full. When brakes are in proper working order they do not release after the air is applied unless they are released by the party controlling it, and they were not released by me.

I was injured in this collision. I had both of my legs broken, sustained internal injuries and the hearing of my right ear is gone. My right leg is three inches short, and my left leg is six inches short. I was unconscious for a long time after the accident. I have no personal knowledge of how long a time I was unconscious. When I became conscious I found myself in the Hospital at Coeur d'Alene. I remained there approximately eight weeks. I was conscious part of the time and part of the time I was not for at least two weeks. After probably two weeks had elapsed I gained strength in a way until, I think it was the fifth or sixth week, and I was set back with injuries in my stomach. The right leg knitted together while I was in the Coeur d'Alene Hospital; that is the one that overlaps. My left leg, I think that was operated on once out there; I was in the surgery once and I was confined in a Fracture Box all the time I was there; I suffered intense pain all the

(Testimony of Edgar E. Campbell)

time. My right ear did not bother me particularly, only the hearing was gone and it is still affected to the extent that I can not hear anything at all with that ear; the hearing is absolutely gone. After leaving the Hospital at Coeur d'Alene, at about the end of the eighth week, I was brought to the St. Luke's Hospital in Spokane, and I remained there until the 12th day of December, 1909. I was taken to St. Luke's Hospital on Sept. 21, 1909; on that date I was operated upon. The operation consisted of the removal of fragments of bone to the extent of six inches in the left leg. I suffered severe pain all the time I was there until I got out, and I am still suffering pain. I have an infection that goes through my foot and also through the side of my left leg. It breaks out about every four or six weeks and pus and matter run out of it. It appears to be caused from a screw being loose in the silver plate, which fastens the bone together in my left leg. I am affected very greatly by climatic conditions and suffer great pain at times. It has affected my nervous system to the extent that I do not have very much left. I can sleep but very little, probably three or four hours a night. This sleeplessness is caused from pain.

Just prior to this accident I was earning on an average of about One Hundred Twenty-five Dollars (\$125.00) per month, now I am earning Seventy-five Dollars (\$75.00) per month, as Treasurer of the Brotherhood of Railway Trainmen. I have

(Testimony of Edgar E. Campbell)

been thus employed since Jan. 1, 1912, and prior to that time I did not have any employment. The position I now hold is elective, and it is not permanent.

CROSS EXAMINATION.

When I said that I had been looking at my timetable to make a meet on No. 22 I meant that it is the duty of all special trains to look out for all regular trains and to make meeting points with them, unless you are directed to make a meeting point by train order from the dispatcher. Regular trains are run on schedule time, and the motorman running a special train has to watch out to make a meet for them. Unless he has special orders to meet them at some place, he has to look out for them himself. When a motorman running a special train is not given orders about regular trains, then he must himself look out for them, and at whatever place they are to be at a certain time, he must be on the switch out of their way so that the regular train might pass, and this is so without any orders being given. A special train is a second class train and a regular train is a first class train, and second class trains are required to clear the first class trains at least five minutes. No. 20 was a regular train, and Motor 5 that I was running was a special train. Unless I had special orders covering the case, I was required to look out for the regular train. When I pulled out of Coeur d'Alene on July 31st, it was my duty to keep clear

(Testimony of Edgar E. Campbell)

of No. 20, if I had not a special order telling me where to meet it. If I did have a special order telling me where to meet No. 20, then I would meet it at that place. If I had not had a special order telling me where to meet No. 20, then it was my duty to be at a place where No. 20 could pass in safety. On the morning of July 31st, I took Motor 5 out of the terminal station in Spokane. It was coupled up with its trailers when I took charge of it. It was fifteen or twenty minutes, possibly not that long, after I got into the cab before I started. I tested my air before I started. It was my duty to do that. I had to have clearance orders before I could leave. I don't remember whether I ran special all day or not. I was on Motor 5 all day, and did not change the trailers during the day. I was on the start of my third trip between Coeur d'Alene and Spokane on that day when I was injured. When you are running a regular train, if you are going to run right through on schedule and are not going to meet trains in any unusual place, we have no orders except to clear for Coeur d'Alene. If you are running special, you may have orders to run giving you the power to make your own meets, or the dispatcher may make meets for you on other special trains, or on regular trains, through the orders. We may have an order reading that you would run special from Spokane to Coeur d'Alene without anything further in it, and when we have such an order I make my own

(Testimony of Edgar E. Campbell)

meets on the regular trains. There are many different ways for a dispatcher to put out an order. We may have an order that Motor 5 would run special from Coeur d'Alene to Spokane and meet any regular train or special train at any designated point, and meet more than one. When I said I turned my train in the shop wye at Coeur d'Alene, I meant that I backed in the shop and headed out, thereby turning my train around so as to head back toward Spokane. There is a wye some distance west of the shops on which trains which could not turn in the shop were turning. I had a small equipment that could turn in the shop. I wyed at the shops all day. The shops at which I wyed were right across the street from the depot in Coeur d'Alene. The other wye was about half a mile or three-quarters west of the depot. On the map which is shown me I see the lake front of Coeur d'Alene Lake, with a wharf running out into it. The depot is right at the end of that wharf at the point marked "D." The shops are across the street at the points marked "S." "S." and the wye that I turned on runs into those shops. Following along the right of way to a point on the map opposite what is marked as "Lot 12" I see a white line turning to the left and downward, and running down opposite a point, to a place marked "Lot 10," I see another white line turning in and coming down and joining that one. It is supposed to be the wye which is some distance

(Testimony of Edgar E. Campbell)

west of the depot, but it does not look far enough up. The wye, however, is up there somewhere. (The map was marked with the letter "W" at the junction of the two tracks.) If a train were going to turn at the wye marked "W," it would come in from Spokane, turn off at the outer leg of that wye, run down through the letter "W" until the hind car would clear the junction of the two tracks, then the switch would be turned and it would back down, going out on the other leg of the wye. If a train going out of Coeur d'Alene was going to meet a train coming into Coeur d'Alene at the wye, it could stop between the two legs of the wye, though if it did it could not see the train that was in the wye. If I was to meet a train at the wye, I would stop on the main line on this side of the wye and would stand there until the incoming train had gone onto the wye, and then I would go on out. Trains were supposed to stay at the terminal in Coeur d'Alene until the other trains came in. They did not have the right to go out to the wye unless they had orders to. I never waited at the wye for incoming trains. Before I became a motorman I was examined in writing as to my duties, successfully passed the examination, and was then promoted to be a motorman. The order I received to run special from Coeur d'Alene came from the dispatcher at Spokane. I understand his name was McMaster. Such an order is transmitted by telegraph or telephone to an operator at Coeur

(Testimony of Edgar E. Campbell)

d'Alene who writes it down on manifold copy, making two or three copies, or as many as the dispatcher requires him to make. Those orders are written on tissue paper. He writes on one and it copies through carbon so as to make additional copies; then he wires it back to the dispatcher in Spokane to be sure that he has made his copy correct. If it is correct, the dispatcher orders the operator at Coeur d'Alene to put the signature of the superintendent to the order. When that is done, the operator delivers the orders to the conductor and the conductor reads the orders back to the operator, and then the operator signs what we call an O. K. and complete on the order, the time of receipt, the signature of the conductor and engineer, or motorman, as the case may be, and acceptance of the order. A copy of the order is given to the conductor for himself, and also a carbon copy of it is given to the conductor to be handed to the motorman. These carbon copies are identical. The agent himself keeps one of them, the conductor gets one from the agent for himself, and he also gets one for the motorman. My conductor, Whittlesey, got orders that day and delivered my copy to me. I was in the cab when he delivered it. I read it and then I think I put it in my pocket. Generally I keep all my orders for the day together. I may put them in my pocket or I may hang them on my hook. The clothes I had on that day were all torn to pieces. I have

(Testimony of Edgar E. Campbell)

had inquiry made for the orders I received, and I could not find them.

After I got my orders, read them, and put them in my pocket, or on the hook, the conductor said "All right; go ahead" and then I started. We were in Coeur d'Alene about ten or fifteen minutes from the time we arrived until we started for Spokane. I did not test my air before I left. There were men in Coeur d'Alene for that purpose. I was in my cab all the while. I did not test the air from the cab. Coeur d'Alene is a terminal station. I didn't test my air because they have men there for that purpose, men to inspect the train. I didn't have anybody to go into the cab to test the air. I was the only person who could do that, being in the cab and having charge of the machinery. I didn't test it because the train stopped when I came out on the wye and when I applied it. A man testing air, he will set his air in the cab and then go around the entire train to find out whether the air is working or not. They had a man there for that purpose, and that is the reason I did not test my air. I didn't know that anybody inspected it there. I had made two round trips and a half that day between Coeur d'Alene and Spokane. My air had been working all right all day. When I wyed in, it was working all right. When I started out and released it to go, it was working all right, and the first time that I found anything the matter with it was when I used it in

(Testimony of Edgar E. Campbell)

that particular position. I am familiar with the rules of the company. Rule 241 in the Book of Rules, marked "Defendant's Exhibit 1" for identification which you show me reads as follows:

"Conductors and Motormen or Enginemen will give air brakes personal attention and exact similar care from Brakemen, and will not start a train from a terminal, or from any point after switching has been done, cars set out or picked up, engines or motors changed, or where for any reason train pipe has been disconnected, until after a test of air by Car Inspectors or by train and Enginemen or Motormen."

That rule was in force at the time of the accident. Coeur d'Alene is a terminal. I did not test my air before starting it, nor have anybody else test it. (Thereupon the book of rules was received in evidence and marked "Defendant's Exhibit 1.") The book of rules, so far as relates to air brakes, received in evidence and marked Defendant's Exhibit 1" reads as follows:

"240. Motor-, Engine-, Train- and Yardmen must be thoroughly conversant with the use and care of air brakes.

241. Conductors and Motormen or Enginemen will give air brakes personal attention and exact similar care from Brakemen, and will not start a train from a terminal, or from any point after switching has been done, cars set out or picked up, engines or motors changed, or where for any

(Testimony of Edgar E. Campbell)

reason train pipe has been disconnected, until after a test of air by Car Inspectors or by Train and Enginemen or Motormen.

242. Before commencing the descent of steep grades, and approaching locations where failure of brake would be attended with hazard, Enginemen or Motormen must make sufficient application to ascertain that brakes are in operating condition.

243. If an Engineman or Motorman calls for brakes on an air controlled train, it will be the immediate duty of trainmen to rapidly and fully apply hand brakes, and if emergency exists, one of the crew near rear of the train must try conductor's valve or open train pipe.

244. Before starting, Trainmen will see that hand brakes are released.

245. Report must be telegraphed to Superintendent if brakes found defective while on the road to such extent as to interfere with proper control of train or to require special arrangements, and in every case Conductor will make report covering such defects to Shop Foreman or Inspector, upon arrival at terminal.

246. In making up train, all couplings must be united so that brakes apply throughout the train.

247. In detaching engines, motors or cars, couplings must be parted by hand, previously closing the train line stop cocks.

(Testimony of Edgar E. Campbell)

248. Air must be fully released from cars set out of trains on siding, and hand brakes set.

249. Brake gear adjustment should be such that when brakes are fully applied, pistons will travel not more than eight nor less than six inches.

250. When in emergency, brakes are applied by opening conductor's valve, this valve must be held open to allow air to escape until train stops. This method of application should be used only when absolutely necessary. Enginemen or Motormen, upon finding that brakes have been applied by Trainmen, or automatically, must at once aid in stopping train, by turning handle of brake valve to service stop position, thereby preventing escape of air from main reservoir.

251. Uniform air pressure of seventy pounds should be maintained in train line.

252. Enginemen and Motormen must avoid rough handling of trains by applying or releasing brakes.

253. On long descending grades it is important to control speed of train and at same time maintain a good working pressure. Greater time for re-charging is obtained by considerably reducing the speed of the train just before re-charging, and by taking advantage of the variation of grades and curves.

254. When two engines or motors are coupled together at the head of train, both will be connected to train line.

(Testimony of Edgar E. Campbell)

(a) Both may be used to charge a train when train is standing.

(b) When running, air will be controlled by leading engine or motor.

255. A passenger train ascending mountain grades assisted by a helper in advance will be controlled by air from regular engine or motor, train line being cut through the helper, from which, in case of emergency, application may be made.

256. Motormen will be provided with air brake instruction book by Superintendent."

I first saw No. 20 just rounding the curve after we had passed the wye at the spot marked with a cross on the map. She seemed to be coming at full speed and I was going at full speed. I picked up to about thirty miles an hour after we had passed the upper wye marked "W." We could run at any rate of speed through the yards, so we were under control. When I saw No. 20 I dynamited my car. When I saw her I shut off the power; then I dynamited it; threw my air brake into emergency so as to give all the air I had. The air brakes took hold, awhile and then they broke loose, the air released from the train. They held about 30 or 40 feet, something like that, approximately. When they took hold, they checked the speed of the train to about twenty miles an hour, I should judge. After they let loose, the train shot forward at approximately eighteen or twenty miles an hour. It slowed up

(Testimony of Edgar E. Campbell)

a little bit and started to pick up speed again. Then I stopped it a little bit with my reverse, so that at the moment of collision I think we were going about fifteen miles an hour. I was probably about 200 feet from No. 20 when I reversed. I did everything that could be done to stop the train after the air let loose.

My train probably run between 750 and 800 feet after my brakes released, before the collision occurred. The brakes were not working during that time, and had no effect. People upon the train when it is dynamited would feel a sudden jerk, a very considerable jar, such as is produced by nothing else in the operation of trains. There are several causes for air brakes releasing when they have once taken hold right. One cause might be a piece of dirt in the triple valves. The triple valves are a part of the air appliance; some of them are underneath the cars and some of them are in the cars. There are several other things, such as dirty valves in connection with the cylinders. They are so numerous that I cannot name them. I am not so conversant now with air as I was at that time. Those two causes are the only ones I can think of at the present time—dirt getting into the triple valves, or the triple valves getting dirty; or rust or water will sometimes do it. When I wye'd in at the shops at Coeur d'Alene all the day before the brakes had been working all right. If there was any

(Testimony of Edgar E. Campbell)

dirt got into the triple valves, it was not necessarily between Coeur d'Alene and the point where I saw Motor 20. It might have been in there all the time. It was the first time that the valve had been used in that position for some length of time. It is not very often that a motorman has occasion to use his emergency brakes to slow her, to put that kind of a strain. He is not supposed to test his air in all positions in the yards. It is very impractical for a man in any service, any emergency appliances. When a train is standing still and I am testing the air from my cab, I can test it in all positions. I don't know whether the brakes broke in two when I applied them or not; they could do it. If there was an air connection brake in the train line, they might break from putting them on too hard. Possibly it would break the brake-beam, or something like that. It would not release the air unless you broke the cylinder; that would release it. If you did not apply your emergency properly, that might have happened. I don't know what did happen, and I don't think anybody else does, either.

RE-DIRECT.

The station of Alan is four miles west of the station of Gibbs. Gibbs station being between Coeur d'Alene and Alan station. The accident happened at Gibbs. When air is released, the cars sometimes kick forward, or lurch forward.

(Testimony of Edgar E. Campbell)

RE-CROSS EXAMINATION.

The initials R. C. B. at the bottom of a train order were the superintendent's signature, R. C. Bowdish. They appeared at the bottom of all train orders and all bulletins. This bulletin dated July 17, 1909, is signed by the motormen, including myself, and shows that I received that order. I do not know when after July 17th I got orders not to turn the trains at the wye. It may have been a verbal order from the superintendent, and it may have been a bulletin, and it may have been a train order. I don't remember anything about it. That bulletin may have been annulled; it must have been annulled, or I would not have been turning my train at the shops. That is the only reason I can give for saying it was annulled. (The paper shown the witness marked "Defendant's Exhibit 2 for identification.")

(Testimony of Ed Trudell)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

I am a brakeman in the employ of the Great Northern Railway Company. I was a brakeman for the defendant on July 31, 1909, working for Whittlesey on Special 5. Plaintiff was the motor-man. I was on special train No. 5 out of Coeur d'Alene. We started out from Coeur d'Alene that afternoon, and the wreck occurred soon after.

(Testimony of Ed. Trudell)

My attention was first directed when Campbell set the air, and I went back and looked out the rear platform and saw the other train coming, and jumped off. I went back because Campbell set the air. When he set the air I went to the rear platform and looked out and saw the other train coming, and jumped off. He set the air unusually hard, so hard I wanted to see what was the matter. I was in the front car, about six feet from the rear platform, going up to the front end to see what orders they had. The car was crowded, people standing in the aisles, and the platform was full. When I felt the emergency applied I went to the back platform. The emergency checked the train, of course. I felt it go on there, his setting the brake hard, and I got busy getting to the back end to see what was the matter. Then I saw the train coming, and jumped off. The train was going about twenty or twenty-five miles an hour when I jumped. The train did not go over a car's length after I jumped before the collision. I got off the back end of the motor-car.

CROSS EXAMINATION.

The moment the emergency was applied I turned and went out on the platform, saw the other train coming, immediately jumped, and then the crash came. He applied the emergency hard. I cannot say how far the train ran after he applied the emergency until it hit the other

(Testimony of Ed. Trudell)

train. I just had time to get off; it ran all of 150 feet. It took me about fifteen or twenty seconds to get off. I don't know whether the emergency was on when I jumped off. I didn't pay any attention to that. The minute I felt the emergency I thought there was something the matter, and when I looked and saw the other train, I jumped.

(Testimony of Edward L. Dixon)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

I was in Coeur d'Alene, Idaho, on July 31, 1909, and started from there for Spokane on an electric train. I met plaintiff that afternoon. He was motorman on the train. I saw Campbell when he started, I was in the front end of the motor-car, about three or four feet from him. The train started from Coeur d'Alene about 4:30. It must have gone a mile and a half or two miles when I noticed another train coming. My attention was directed to it by Mr. Beck saying: "My God, look! They're coming!" Then he said, "Give her the big hole." The trains were then about 200 yards apart. Campbell applied the emergency brake and it held for a few seconds and then leaked off. It slackened the speed of the train probably six or eight miles an hour. The train was going about twenty-five or thirty miles an hour when he first applied the emergency, and the trains were

(Testimony of Edward L. Dixon)

then about 200 yards apart. I remained on the train until they hit. There was a partition between the baggage compartment and Campbell's cab, with a door in it, and the door was open. I didn't exactly see Campbell right up to the collision. I got back in the baggage compartment as far as I could away from the front door, and that shut off my view of him. After the emergency failed to work, he was trying to hold the jack. I was formerly a railroad employe and am familiar with air brakes similar to the one on this train. I know how air brakes work when they are in proper condition. The air brakes on this train did not work as if they were in proper condition. If these brakes had been in proper condition, that train could have been stopped in about 225 feet. I was standing so close to the door because the train was so crowded that was the only place we saw where we could ride. I saw orders delivered by Mr. Whittlesey to Campbell at Coeur d'Alene and heard remarks made when he delivered the order. First Campbell said, "Shall we go?" and Mr. Whittlesey says, "Yes; we had just as well go, I guess." That was in Coeur d'Alene. Immediately after that, Campbell got on the train and pulled out. I had just met Whittlesey that afternoon. Whittlesey got his orders from Mr. Cook, the trainmaster, and it was not over five minutes from that before we pulled out.

(Testimony of Edward L. Dixon)

CROSS EXAMINATION.

Cook was on the west side of the depot when he handed Whittlesey the orders. I know they were orders because I saw Whittlesey and Campbell reading them. They read them before Campbell got in the cab. Campbell was not on the cab when he got the orders and read them. He and Whittlesey were both on the ground, close to the train. Whittlesey handed a copy to Campbell and kept a copy himself. I was standing there with them. I had not yet got on the train, and after they had each read them, Campbell says, "Well, shall we go," and Whittlesey says, "Well, I guess you might as well," and then Whittlesey went and got on the train. Campbell climbed up into his cab, and I got up into the crowded car. We got on in front at the baggage compartment door. Everybody seemed to be taking their time. Whittlesey stood there and read his orders, and Campbell stood there and read his. Then everybody climbed on, and in a few seconds they started. I saw Campbell climb in his cab. He got in through the baggage compartment door himself, the same as I did. There were a number of people in the baggage compartment; they were all standing. I was standing on the right hand side of the door. The door that opens into the cab. Campbell was about three feet from me. There was nobody in the cab but Campbell. I didn't see the other train

(Testimony of Edward L. Dixon)

coming before Beck hollered. I was looking at the scenery along side the track. I was looking through the door. The door between the cab and the baggage compartment. The door was in front of us. I was looking out in front. When Beck shouted I got back in the baggage car as far as I could away from the front end. Beck stayed on the train until he saw the brakes leaked off, and then he went out the window. I could not back very fast because there were so many people in the baggage compartment. Campbell applied the emergency brakes and then it leaked off. It held, I should judge, a matter of thirty or forty feet. I didn't back while the brakes were leaking off. I supposed they were holding. I could feel them leaking out a little later on when they began to get loose. They commenced to loosen when we had gone fifteen or twenty feet. I began to back away as soon as I noticed the brakes were leaking off. The brakes didn't leak off in fifteen or twenty feet, they were further than that, I should judge about thirty or forty feet, before they finally leaked off. I didn't stand in the door until they leaked clear out. I knew they were going to leak off. The train I was on slackened its speed. The application of the air reduced it somewhat. It didn't appear to slacken much after they leaked out. The air leaked out gradually. As long as the brakes held the speed was reduced, and after the air had

(Testimony of Edward L. Dixon)

leaked out the train continued on its way, but didn't increase its speed any. The applying of the brakes reduced the speed. I didn't take particular notice whether after the brakes released there was much slackening of the speed of the train. I was a locomotive fireman on the Northwestern for about four years, and while there had occasion to use air brakes, and have stopped trains with them.

Campbell's train consisted of three cars. I don't know exactly the size of the cars; they are smaller than ordinary standard coaches; they are about half as big as such coaches.

(Testimony of William Beck)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

On July 31, 1909, a party of six or seven, of which I was one and Mr. Dixon another made a trip to Coeur d'Alene. Mr. Dixon and I are both railroad men. I have been engaged in railroading as brakeman and conductor on the Northwestern lines for about seventeen years. I knew Mr. Cook when he worked on the Northwestern a good many years ago. He introduced me that day to Whittlesey and Campbell, and when we were about to leave, Dixon and I got in the baggage compartment. In this motor-car there was a partition somewhere about eight feet from the front part of the car with a door on either side, and I think the baggage compartment, as near as I can figure it,

(Testimony of William Beck)

was about eight feet square. The motorman sits right in front in his compartment. There is a partition between the motorman's compartment and the baggage compartment, with a door in it. In the rear of the baggage compartment there is another door leading into the passenger compartment. I was standing right in the motorman's door on the left side with Mr. Dixon standing on my right. Mr. Dixon and I were standing there visiting in the door, and when we got out somewhere near the curve I noticed the other train approaching. The motorman was turned around, had his back to the approaching train, and I called to him. If I remember right I said, "For God's sake shut her off." Mr. Campbell pulled his air immediately, but it jumpel off, or something. It just took hold for a short length of time and then the car plunged ahead again. I cannot say what he did after that. I was too busy trying to find a safe place to light. I dove through the window right opposite the motorman on the side. They went probably 100 or 150 yards after the air began to leak before I jumped. I think I hit the ground about thirty feet before they struck. I was right alongside the second car when they met. There was no way for me to escape. I could not get back through the crowd. I was a very large man and there was no way for me to get out. The cars were pretty well crowded; they were all standing up in the baggage compartment. When the air

(Testimony of William Beck)

was first applied, it had an observable effect upon the train. At the first emergency he gave it, it took hold, and then it jumped off for some reason or other. I am a railroad man of a number of years' experience. If the air had been working properly I could not say whether that train would have been brought to a full stop, but the train could have been brought to as near a stop as the other one did, it is my idea if the air had worked.

CROSS EXAMINATION.

I suppose we were about 250 yards away from the other train when I first saw it—about 750 feet, I should say. I don't know, I could not state exactly. Our motorman wasn't looking, he had just turned around his back, something behind his wheel there. I could not say what it was. He had his back to the train when I called his attention to it. I called his attention to it as soon as I saw it. I was the first man who saw it. We were going about twenty-five miles an hour. I cannot say whether if the air had been working properly we would have come to a stop before the collision. I cannot tell you much about the brakes on these electric trains as I never had any experience. I think they could probably have slowed down so there would not have been so much danger, but I cannot say whether they would have stopped it. I said to the motorman "For God's sake shut her off." Then he turned around and looked forward. He turned around; he had his back—working

(Testimony of William Beck)

somewhere behind on the machine, what they call it I can't tell you anything about it; had his back to the front end, down in the corner there. Something was wrong with his seat, or something he was working with, and when I called him he immediately threw on the emergency. I cannot say how far she ran after the brakes took hold before they let loose. She took hold for a very few seconds and then jumped off again. They might have run twenty, or thirty, or forty feet. It is pretty hard to tell in a case of that kind. She did not increase in speed from the time the brakes let loose until they hit. The first emergency slowed the train a certain amount. We were probably going about twenty miles an hour after she slowed up. Campbell was down on the ground when I met him at Coeur d'Alene and shook hands with him. Cook introduced me to him and Whittlesey. Campbell was standing on the ground and got right on the train after I was introduced to him. He got on before I did. I didn't hear any conversation between Cook and Whittlesey.

(Testimony of Philip Beck)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

I was a passenger on the train coming to Spokane which collided with another train near Gibbs on July 31, 1909. I was in the motor-car in the rear seat that went crossways on the south side of the car. I was talking when I felt the brakes

(Testimony of William Beck)

applied giving such a jar that I stuck my head out of the window and saw another train coming. I called out they were coming together. I thought he could stop the train, but the air held for an instant, then it released, and we went on, and it was probably a matter of ten seconds until they collided. Our car ran right under the other motor-car. Their motor was right up on top of ours.

(Testimony of Edgar E. Campbell)

The plaintiff, recalled for further cross examination, testified as follows:

If the paper which you showed me yesterday (being Defendant's Exhibit 11) purporting to be train order No. 53 had been delivered to me at Coeur d'Alene as my train order to run on that trip from Coeur d'Alene to Spokane, it would have been my duty to have remained in Coeur d'Alene until No. 20 was in.

WHEREUPON, plaintiff rested, and thereupon the defendant, to sustain the issues on its part, introduced the following testimony:

(Testimony of W. C. Mock)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he was the resident engineer for defendant and the map shown him and introduced in evidence as Defendant's Exhibit No. 9 was the same as the map shown to plaintiff and concerning which he was examined, save that the tracks were marked

(Testimony of W. C. Mock)

on it in red. that the Coeur d'Alene depot was at the point marked "D" and that the shops in Coeur d'Alene were across the street from the depot at the points marked "S" and "S"; that there are two tracks from the depot at Coeur d'Alene to the east arm of the wye, which is in the west part of the Coeur d'Alene yards, and that the junction of the two arms of the wye is marked "W"; that the Coeur d'Alene yard limits are in the west end of the yard away from the depot at the point marked "WY," while the other end of the yard limits was east of the depot on the Hayden Lake line; that going on west from the west switch of the wye there was a three degree curve marked "C," and continuing on west the east switch to Gibbs is reached, marked "ES"; that going further on is the west switch at Gibbs marked "WS," and 300 feet west of the west switch is the shelter station, the passenger stop at Gibbs, marked "SS," and that going still further west is the Northern Pacific track crossing over defendant's lines, marked "NPT"; that the wye at the further end of the Coeur d'Alene yards is to turn trains on; that trains coming from the west, if they want to turn on the wye, would head in on the west switch of the wye, go up on the oil spur, and back up on the other leg of the wye, and then they would be turned around headed west again.

(Testimony of James Delaney)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a motorman in the defendant's employ, and on July 31, 1909, was motorman on No. 20. It was a regular train. I had no orders to meet the special Motor 5 and having no orders had the right of way into Coeur d'Alene. Special Motor 5 was the train that collided with No. 20. My train was about 400 feet west of Gibbs station, I should judge, when I first saw Motor 5 coming. I was slowing down to stop at Gibbs. Motor 5, I should judge, was about 800 feet away when I first saw it. I applied the emergency brake and brought my train to a stop before the collision, within a distance of about 200 feet. No one was injured on my train. I was running about eighteen miles an hour when I saw the other train. At this time all trains were turning on the wye in the west end of the Coeur d'Alene yards, excepting No. 24, and this was done in accordance with a bulletin which had been issued some time before. Train No. 24 was excepted because it was a train that run through to Hayden Lake, and so had to proceed on its way east after stopping at the depot in Coeur d'Alene. All the Coeur d'Alene trains turned at the wye and backed in. That order had not been annulled on July 31st.

CROSS EXAMINATION.

My train was heavier than special Motor 5. We were going about eighteen miles an hour, and I

(Testimony of James Delaney)

stopped within 200 feet. I have run equipment No. 5 and if everything had been in working order, in the same position that Campbell was in that day, I could have ordinarily stopped it within 400 feet from the time I applied my brakes.

(Testimony of F. D. Seymour)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a conductor in defendant's employ, and was the conductor of No. 20 at the time of the collision with special Motor 5 at Gibbs. I had no orders to meet special No. 5 at Alan, or anywhere else. The train was a regular one running on schedule time, and having no orders, it was my duty to proceed on to Coeur d'Alene. If orders had been given Motor 5 to meet us at Alan, we should have had orders to meet Motor 5 at Alan. At this time and for some days before we were turning our trains on the wye in the west end of the Coeur d'Alene yards in pursuance of a bulletin to that effect which was issued and had not been annulled.

CROSS EXAMINATION.

No. 20 was about ten or fifteen minutes late that day.

(Testimony of F. W. Stranger)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a motorman in defendant's employ, and on July 31, 1909, was operating an extra passen-

(Testimony of F. W. Stranger)

ger train, special No. 4. At the time of the wreck I was running my train from Spokane to Coeur d'Alene running special. We had orders to meet special No. 5. These orders were in writing and delivered to me in the regular way. I did not keep them, and don't know what became of them. I got my orders at Spokane Bridge, which is about ten miles from Gibbs. When the wreck took place we were on the sidetrack at Alan. We had been at Alan six or eight minutes before we heard of it. In accordance with our orders, we went to Alan to meet special 5 and headed in on the sidetrack. The conductor called up the dispatcher after we had been there probably five minutes, and after he went to the telephone booth and tried to call up the dispatcher, he came out and called me to the 'phone, and said there was a wreck at Gibbs. We remained at Alan about half an hour, and then received orders to go somewhere else. At this time all Coeur d'Alene trains were turning on the wye in the west end of the yards, pursuant to a general bulletin. The equipment of special Motor 5 that Campbell was running was exactly like the equipment on my train, and both were made up of three cars.

CROSS EXAMINATION.

A duplicate of my orders were in the conductor's hands; also there is a duplicate of the orders in the hands of the other trainmen we were to meet, and a copy kept in the dispatcher's office at Spo-

(Testimony of F. W. Stranger)

kane. The operator at Spokane Bridge is supposed to keep a copy of the order too. I had driven equipment No. 5 several times before the day of the collision.

(Testimony of C. W. Morrison)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a conductor in defendant's employ. On the day of the Gibbs wreck I was conductor of Motor 4. It was running on orders. I received written orders to meet special 5 on that date. I have not got my orders, and do not know what became of them. We don't keep them after they have been fulfilled. We got the order at Spokane Bridge. I first heard of the wreck at Alan. Our order was that Motor 5 would run special Coeur d'Alene to Spokane, meeting Motor 4 at Alan; that meant that my train and special 5 were to meet at Alan. When we got to Alan we headed in on the sidetrack to meet Motor 5. We waited there a few minutes before I called up the dispatcher from the telephone booth. There is no operator at Alan. I called up the dispatcher to see if he had changed the meet on Motor 5 and when I took down the 'phone I heard them talking over it about the wreck at Gibbs. We remianed at Alan about forty-five minutes and then left under other orders. At this time it was our instruction to turn all Coeur d'Alene trains on the wye in the west end of the

(Testimony of C. W. Morrison)

Coeur d'Alene yards. Our equipment, and the equipment of Special 5 were similar, both being small trains. The paper you hand me purporting to be train order No. 53 addressed to Motor 5 at Coeur d'Alene is a copy of the order that we had. The order we had we received at Spokane Bridge. It would be addressed to Motor 4 instead of Motor 5. The signatures of the conductor and motormen would be different, but the body of the order was exactly the same. The order meant that we were to meet Special 5 at Alan.

CROSS EXAMINATION.

We never kept the orders after they were fulfilled. There may have been a rule that we should turn the orders in at night. I am not sure. I know it was not obeyed. The order was in my possession when I knew of the wreck.

(Testimony of H. G. Whittlesey)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am in the train service of the Oregon-Washington Railroad & Navigation Company. On July 31st, I was a conductor in the defendant's employe. I was the conductor on Special 5. The plaintiff was my motorman. All trains going to Coeur d'Alene turned on the wye in the west end of the yards at that time in pursuance of a posted bulletin. No. 5 had on that day and its previous trips headed in on the wye, turned and backed down

(Testimony of H. G. Whittlesey)

into what was called the Hayden Lake branch. This was being done during the rush due to the land registration at Coeur d'Alene. In the afternoon of that day after backing in and getting ready for departure two copies of train orders were handed to me. These were duplicate copies, carbon copies, and they were just alike, one for the motorman and one for myself. I read one myself and gave the other one to Campbell. He didn't read it to me, but he unfolded it and started to read it after I gave it to him. I don't know whether he read it. I afterwards give my order to Mr. Bowdish, the superintendent of the company. The paper you show me purporting to be train order No. 53 dated July 31, 1909, is a copy of the order I handed Campbell. The order shown the witness was admitted in evidence, marked "Defendant's Exhibit 11," and is as follows:

"Spokane & Inland Empire Railroad Co.

Train Order No. 53.

From Spokane 7-31-1909.

To Motor 4 at C D Alene Station

Motor 5 will run Spl CD Alene to Spokane meet Spl 4 East at Alan.

R. C. B.

Conductor, Motorman, Engineer and Brakeman must each have a copy of this order. Conductors receiving orders at station where there is no operator will not use clearance, but will have motorman

(Testimony of H. G. Whittlesey)

repeat orders to dispatcher, at which time complete will be given.

Conductor	Motorman or Engineer	
Whittlesey	Campbell	
Train	Complete	Operator
Spl. 5	427 p. M.	Smith."

The initials R. C. B. at the bottom are those of the superintendent, Mr. Bowdish. The name at the bottom is Smith, the operator taking the order. After delivering the order to Campbell and reading my own order, I told him that No. 20 was not in yet, to go to the wye for them. That is where they were in the habit of turning to come down to Coeur d'Alene into the depot. We knew No. 20, when it came in, would have to run into that wye and we were to wait at the wye for it. Just before the train started I walked around in front of the motor and got on the baggage compartment of the motor, and then it started. I handed Campbell the order and told him to go to the wye, that No. 20 wasn't in, to go to the wye for it. He says, "All right; are you ready?" I says, "Yes, let her go," and then walked around in front of the motor, and then got into the baggage door, or the baggage compartment of the motor, and started taking tickets. The train started, and the next thing I knew I felt the air applied, and I supposed that he was running over the wye somewhat, and seeing 20 coming was going to back up, but he kept on going a little further, and the wheels

(Testimony of H. G. Whittlesey)

began to slide and I knew that something was going to happen, and I turned around in the aisle and braced myself, and then the crash came. I have no idea how long it was after I felt the air applied before the crash came. I would not say over twenty seconds at the outside. I have no accurate idea. I was in the center way of the passenger compartment of the motor when the crash came. I started taking my tickets in the baggage compartment and after I felt the air applied I didn't have time to do anything besides brace myself before the crash came. After he left the station at Coeur d'Alene until I felt the brakes come on, I didn't pay any attention to what Campbell was doing. It was my duty to have seen that Campbell stopped at the wye, but I didn't do so, and I was discharged by the company because I did not, and have not been in the employ of the company since. I supposed Campbell would look out for it. He had been. No. 20 was overdue when we left Coeur d'Alene. Anyone where my train was could see she was not in, and I knew it was not in. It was Campbell's duty and mine not to leave Coeur d'Alene under that order until No. 20 was in, and to do so before No. 20 was in was a direct violation of all the rules of railroading. I had no orders about running the train other than the one just introduced in evidence. I had no orders against 20 at all, only verbal orders from the trainmaster to go to the wye instead of wait-

(Testimony of H. G. Whittlesey)

ing at the depot until she came in. We had a clear view from the depot to the wye so that we could see that 20 was not in all the way between the wye and the depot. If No. 20 was coming from the other side of the wye, she would have to stop and switch in at the wye. When the emergency brakes were set, they did not go off, they just kept grinding until the collision.

CROSS EXAMINATION.

The main line of the road extends down to the depot. No. 20 coming in had a right of way over the main line right straight through to the depot. We had equal rights inside the yard limits on the Coeur d'Alene side of the wye. When I told Campbell to pull out to the wye, I put him on the main line. We had equal rights with No. 20 to the yard limit board. The order of July 17th to turn at the wye could have been revoked at any time. The order was not permanent, just during the rush. I should judge the train was running about 20 or 25 miles an hour when I felt the air. It was less than half a mile from the point where we started to the wye. The point of the accident was about a mile beyond the wye. I read my orders. I suppose you might call me the superior officer in charge of the train. I was equally in charge of it with the motorman. In regards to safety, the conductor of the train does not correspond with the captain of a ship. I allowed the train to run a mile beyond the wye without ringing any bell to

(Testimony of H. G. Whittlesey)

stop it, not knowing where I was. I was in the middle part of the passenger department of the motor-car, but I don't know how far the train ran after I felt the application of air, maybe two or three hundred feet; I could not say; I did not sign the order, Defendant's Exhibit No. 11. Campbell did not. It was given to me by Mr. Cook, the trainmaster.

I felt the effect of the air brake upon the train just before the collision. The application was severe, the emergency, they were all on at once. I could tell that. It checked it quite a bit so there was a jar. You could feel the jar. It decreased the speed of the train quite a bit. I cannot say how much. When it struck the other train it was probably going between fifteen and twenty miles an hour. It had been going twenty to twenty-five when we first set the air, and my best estimate is it was going fifteen miles an hour when it struck the other train.

RE-DIRECT.

The paper you hand me I recognize as the duplicate of the order that has been identified and received in evidence, marked Defendant's Exhibit 11. It is the duplicate of one of the orders that I was handed by the trainmaster that day. It looks like the one I had and gave to Mr. Bowdish.

Paper received and admitted in evidence, marked Defendant's Exhibit No. 12, and is as follows:

(Testimony of H. G. Whittlesey)

“Spokane & Inland Empire Railroad Co.

Train Order No. 53

From Spokane 7-31-1909.

To Motor 4 at C D Alene Station

Motor 5 will run Spl CD Alene to Spokane meet
Spl 4 East at Alan.

R. C. B.

Conductor, Motorman, Engineer and Brakeman must each have a copy of this order. Conductors receiving orders at station where there is no operator will not use clearance, but will have motorman repeat orders to dispatcher, at which time complete will be given.

Conductor

Motorman or Engineer

Whittlesey

Campbell

Train

Complete

Operator

Spl. 5

427 p. M.

Smith.”

Sub-division “G” of Rule 165 of the rules of the defendant company was in force at that time. The rule was admitted in evidence, marked Defendant’s Exhibit 13, and is as follows:

“Responsibility for protection of a train rests with Conductor and Motorman or Engineman, and they must know that their Brakemen, Flagmen and Firemen are conversant with and fully understand the application of all rules relating to the protection of trains, and comply therewith.”

(Testimony of ----- Lacey)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

(Testimony of ——— Lacey)

That he was a clerk in the superintendent's office of the defendant company, and at the request of the counsel for the company he made search of the records of the office for train orders to Motor No. 5 on the day and trip of the wreck; that he found the duplicate of Defendant's Exhibit 12, but was unable to locate any other duplicates; that he found also the paper marked "Defendant's Exhibit 2 for identification" which was thereupon admitted in evidence and marked "Defendant's Exhibit 2," and reads as follows:

"July 17th, 1909. All concerned, Coeur d'Alene Division. Turn your train as you go into Coeur d'Alene. This does not include No. 24. This until further notice, R. C. B.," with names of motormen and conductors signed to it.

(Testimony of K. W. McMaster)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That on the day of the Gibbs wreck he was a train dispatcher in defendant's employ, with his office at Spokane; that he was on duty at the time of the wreck; that the duties of a dispatcher are to supervise the movement of trains over the roads; that he kept a record of train orders in a train order book, and also a train sheet showing the movements of all trains during the twenty-four hours; that in the train order book were kept copies of all train orders issued; that the train

(Testimony of K. W. McMaster)

orders are numbered consecutively starting with No. 1 at midnight and running in consecutive numbers to midnight of the next night. He identified the train order book handed him as the one kept in the dispatcher's office on July 31, 1909; that order No. 53 as it appeared in the book was the record of the train order of that number duly issued. Taking order 53 as an instance of the method of dispatching trains, that order was put out to Spokane Bridge to Special Motor 4 east and to Coeur d'Alene to Motor 5 just starting out of Coeur d'Alene, which is a running order, an order to go out on the main line for Special Motor 5. It was put out simultaneously to Spokane Bridge and to Coeur d'Alene being sent by telegraph to the operator at Spokane Bridge and to the operator at Coeur d'Alene. When they received the order, they repeated it back to the dispatcher to see if they had it correctly. The dispatcher at that time made a record in the book from the order as repeated to him. When it was repeated correctly, a complete was given by the dispatcher, and the completed order, with the clearance attached, entitled the train to leave the station where they received the order under that order. The train must operate under such an order until it is annulled. Train order No. 53 as it appeared in the dispatcher's book which is admitted in evidence and marked "Defendant's Exhibit 14," is as follows:

(Testimony of K. W. McMaster)

“(53)

B R C & M Spl 4 E

Comp Clear 425 p G

Ca C & M M & R 5

Comp Clear 427 p NS

Motor 5 will run Spl C D Alene to Spokane meet Spl 4 E at Alan.”

This identical order was telegraphed to Special 4 and Special 5. The one to Special 5 was addressed to the conductor and motorman of Special 5 at Coeur d’Alene, and the other was addressed to the conductor and motorman of Special 4 east; otherwise they were identical. When 4 and 5 received the order they understood they must go to that point to pass the other train, and not leave there until the other train had passed. No orders were sent out by the dispatcher on July 31st except those which appear in the book. If an order has been sent to Motor 5 to run special Coeur d’Alene to Spokane meeting No. 20 at Alan, a corresponding order would have been sent to No. 20. Such an order would restrict the right of No. 20 and No. 20 would have to have the order. On the afternoon of July 31st, Special 5 was cleared at the dispatcher’s office to leave Spokane for Coeur d’Alene at 2:49. We keep a train sheet also in the dispatcher’s office. This train sheet was made by all the dispatchers who worked that day, three different dispatchers: C. M. Sewall from 12:01 a. m. to 7:00; A. S. Bimrose from 7:00 a. m. to 10:30 a. m.; W. W. McMaster, from 10:30 a. m. to 7:30 p. m.; W. C. Dunning from 7:30 p. m. to

(Testimony of K. W. McMaster)

10:00 p. m.; C. M. Sewall from 10:00 p. m. to 12 midnight. The record of every train going was kept on the sheet, showing the motor number, conductor, motorman, etc., and the time of arriving at and leaving every station between Spokane and Coeur d'Alene. The arriving and leaving time is given the dispatcher by the operator and the dispatcher enters the time on the sheet as it was telephoned to him by the operator. On Special Motor No. 5's trip from Spokane to Coeur d'Alene on the afternoon of July 31st they left the terminal at Spokane at 2:50, went by the dispatcher's office at East Spokane at 3:00 o'clock, Greenacres at 3:25 p. m., without stopping, arriving at Spokane Bridge at 3:38, leaving 3:40; by Post Falls at 4:04 p. m.; arrived at Coeur d'Alene 4:20 p. m. The record shows that Special 5 left Coeur d'Alene on its return trip to Spokane at 4:30 p. m. That is the last record of it. It didn't get anywhere else. No. 20 on that day left Spokane terminal at 3:12 p. m.; dispatcher's office at 3:20 p. m.; arrived at Greenacres at 3:49 and left at 3:50 p. m.; arrived at Spokane Bridge at 4:05, departed 4:08; arrived at Post Falls at 4:22, departed at 4:23; arrived at Coeur d'Alene at 7:00 p. m., being delayed by the wreck. The nearest station to Alan is Post Falls. It left Post Falls at 4:23, which is two miles from Post Falls to Alan, so that No. 20 would be at Alan about 4:30. Special Motor 4 east on this trip left Spokane terminal at 3:45 p. m.; dispatcher's

(Testimony of K. W. McMaster)

office at 3:55 p. m.; Greenacres at 4:25 p. m.; arrived at Spokane Bridge at 4:35 p. m., departed 4:36 p. m.; by Post Falls at 4:48. No arriving time is shown at Alan because there is no operator there, but it should have arrived at Alan about 4:55, between 4:50 and 4:55. Special Motor 5 leaving Coeur d'Alene at 4:30 should have arrived at Alan at about 4:45 if it had not been for the collision. Every train being operated on the division is operated from the train sheet and the time card. There can be no mistakes in the train sheet, or wrecks would occur. Special trains are inferior trains and regular trains superior ones. Inferior trains must keep clear of superior trains. Dispatchers do not notify the specials where the regulars are. The special knows of the regulars by the time cards and the train registers at the terminal station. If a special has no orders to meet a regular at any particular place, it must keep clear of the regular train.

A rule of the company required the conductor and motorman to sign orders received by them, but it was not always lived up to. Sometimes they were signed by the dispatcher or trainmaster for the purpose of expediting the movement of trains. No. 20 was due at Coeur d'Alene at 4:12 p. m., so it was due there before Special 5 actually reached that point.

RE-DIRECT.

The fact of the regular train being late would not make any difference as to the duty of the

(Testimony of K. W. McMaster)

special to wait for it until it was twelve hours late. When a regular train is twelve hours late, it loses both right and class. No. 20 was only a few minutes late and was just the same as being on time. Special 5 had to wait for it. Special trains on the Coeur d'Alene division are numbered by the motor-car number. Special 5 left Spokane on the afternoon of July 31st for Coeur d'Alene twenty-two minutes ahead of No. 20, and came in ahead of it, Special 5 reaching Coeur d'Alene at 4:20 p. m. and No. 20 not reaching there until 7 p. m.

(Testimony of R. C. Bowdish)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

In 1909 I was superintendent for the defendant. I remember the wreck at Gibbs. Defendant's Exhibit 2 is a bulletin issued by me providing for the turning of trains into Coeur d'Alene at the wye in the yard. That bulletin was in force on July 31st. It was put in effect because there was a land registration at Coeur d'Alene and we were handling from 10,000 to 12,000 people a day. There was always a swarm of people over our tracks and around the station, and that bulletin was issued to avoid accidents and expedite the movement of trains and passengers in and out of the depot. During that period if an outgoing train was ready to go and an incoming train had not arrived, the outgoing train would pull out slowly and go out of the crowd to the wye and wait until the in-bound

(Testimony of R. C. Bowdish)

train reached there and headed in on the wye. There is a clear view from the depot to the yard limits board, which board is in the neighborhood of 1000 feet west of the Spokane leg of the wye. A day or two after the accident, I met W. G. Graves, one of the company's counsel, in Coeur d'Alene, went with him to the depot, hunted over the operator's files and took the operator's copy of the order that was issued to Motor 5; then went down to Conductor Whittlesey's house and got his copy of the same order. I examined those two copies and they are exactly alike, being taken on manifold. Those two orders were used before the coroner's inquest and at the investigation afterwards held in the Federal court room, and they were then placed on file in my office. I would recognize those orders if I were to see them. I recognize Defendant's Exhibit 12 as one that Mr. Graves and I got at Coeur d'Alene. Defendant's Exhibit 11, I did not see until in the last three or four days when Mr. Graves showed it to me in his office.

CROSS EXAMINATION.

I cannot say that Exhibit 12 is the very sheet of paper that I have seen before, but it is the same numbered order, the same date, and my recollection is that it is the same wording that I saw on the order obtained in the office. The two copies I had I gave to my chief clerk and told him to file them.

(Testimony of W. G. Graves)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he was one of defendant's attorneys; that a day or two after the accident he went with Mr. Bowdish to the agent's office at Coeur d'Alene and procured the agent's copy of order No. 53; then went to Whittlesey's house and obtained from him what he furnished as the copy of the same order, the running order that he had for Special 5 out of Coeur d'Alene. The two copies were compared and found to be the same. They were produced at the coroner's inquest, together with the train order book which has been introduced in evidence and which shows order No. 53. The papers were then taken either by Mr. Bowdish or Mr. McMaster and kept for about a week, and then used before an investigating committee which was inquiring into the cause of the wreck. After that hearing, the papers were turned over to someone in the superintendent's office. Defendant's Exhibit 12 is just like one of the orders we had at that time. Defendant's Exhibit 11 was received from Mr. H. K. Relf some weeks before the trial, was placed by the witness in his safe and kept there until the time of the trial; that order is exactly in the condition in which it was received from Mr. Relf.

(Testimony of H. K. Relf)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he obtained Defendant's Exhibit 11 from Charles Porter at Ashland, Oregon, on June 25, 1912; that the order was initialed by Mr. Porter before its delivery, was brought by Mr. Relf to Spokane and given to Mr. Graves; that it was the same paper that he saw in Porter's office at Ashland, and afterwards obtained from him there; that he paid Porter one hundred dollars for the order.

(Testimony of Charles Porter)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he resided at Ashland, Oregon; that he was living in Coeur d'Alene at the time of the Gibbs wreck; that the day after the wreck, while out at the scene of it, he picked up certain papers by the wrecked motor which he recognized as train orders; that one of those was Defendant's Exhibit 11; that he afterwards marked it as it appears and sent it to Mr. Relf, being paid one hundred dollars by Mr. Relf for the order.

(Testimony of K. W. McMaster)

Re-called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I examined the train order book after I was on the witness stand yesterday, and there is no order there directing Motor 5 west to meet No. 20 at

(Testimony of K. W. McMaster)

Alan. It would not be possible for such an order to have been issued by me without it appearing in that book. The only orders which were issued to No. 20 on that date are train order No. 46 delivered to No. 20 at the dispatcher's office at Spokane, which reads:

"Special 9 west will meet No. 20 at Orchard Avenue."

That order was delivered to Special 9 west at Greenacres. Another order to No. 20 is train order No. 50 which was delivered to No. 20 at Spokane Bridge and reads "No. 20 will meet No. 21 at Spokane Bridge." Those are the only orders to No. 20 that day; otherwise it was running on its schedule.

(Testimony of W. B. Burdick)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I was master mechanic for defendant at Coeur d'Alene on July 31, 1909. I know the plaintiff Campbell, and remember the Gibbs wreck. I know Motor 5 and its apparatus. I did not receive from Mr. Campbell, or from any other source, any complaint about the condition of the brakes on Motor 5. I was there when Motor 5 pulled out and heard the conversation between Campbell and Whittlesey. Whittlesey was at the cab window, the motor-man's cab window, and all I heard was, "Go to the wye for 20," handing him his orders.

(Testimony of Charles Pierson)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

At the time of the Gibbs wreck I was living at Gibbs and saw the wreck. I was standing beside the track about 250 feet from where they struck. When it passed me, it had not slackened its speed. After it had gone by me it did slacken. It had passed me possibly 75 or 100 feet when it slackened up quite a little. It kept on losing speed all the time as near as I can tell, so that when it struck it was running quite a good deal slower than when it passed me. I don't know enough about the speed of trains to have any idea how fast it was running; when it passed me and when it struck. I saw the east-bound train coming just as the motor-car on the west-bound track passed me. I could not see any slacking of speed then, and about seventy feet after that it commenced to slack and kept on slacking until it struck.

CROSS EXAMINATION.

The marks I put on the map introduced in evidence were about where I was standing. The "T" is where I saw the west-bound train first; the "N" is where I first saw the east-bound train. The west-bound train had not quite come to the straight track when I first saw it. There must have been fifteen or twenty seconds, possibly half a minute, between the time I first saw the west-bound train and the collision. The west-bound train was coming from Spokane, going to Coeur

(Testimony of Charles Pierson)

d'Alene, and it was entirely in view when I saw it. When I first saw the west-bound train the motor-car and part of the second car were coming out of the curve.

RE-RE-DIRECT.

As to the number of seconds that elapsed from the time I saw the train until the time of collision, that is pure guesswork on my part.

(Testimony of G. Gray)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I was a brakeman on Special No. 5 on the day of the Gibbs wreck. Going into Coeur d'Alene on that afternoon the train was turned at the wye in the west end of the Coeur d'Alene yards. When we left Coeur d'Alene on the return trip to Spokane, I was standing on the front platform of the last car, between the second and third cars. Just at Gibbs station I felt the brakes go on. They seemed all to go on, that is about all I remember. I got down on the steps to see what was the matter, and just as I got on the steps I was thrown off, or jumped off, I don't know which. I didn't have time to see another train. I was about half way of the middle of the car when I picked myself up.

(Testimony of R. W. Butler, Charles P. Haywood, O. G. Fjerstead, R. D. Shinn, H. J. Gibbon and William O'Brien.)

were called as witnesses on behalf of defendant, sworn and testified in substance as follows:

(Testimony of R. W. Butler, Charles P. Haywood, O. G. Fjerstead, R. D. Shinn, H. J. Gibbon and William O'Brien).

That they were passengers on Special No. 5 leaving Coeur d'Alene on the afternoon of July 31st; that immediately before the crash of the collision came they felt a jerking, jarring, and grinding of the train as though the brakes had been applied very hard, or something of that sort; that it was so severe as to cause a lurching or jerking of the train, and that it was followed almost immediately afterwards by the crash of the collision.

(Testimony of William W. Moffitt)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I was in the defendant's employ as air brake inspector at Coeur a'Alene at the time of the Gibbs wreck. Prior to the beginning of the land registration at Coeur d'Alene, I went over the air brake equipment on the cars that were used between Spokane and Coeur d'Alene, thoroughly cleaning and oiling the triple valves, brake cylinders, and going over the pipes to look for leaks, repair whatever defects I could find in the equipment. I am acquainted with Motor No. 5, and remember it being at Coeur d'Alene before starting on the trip to Spokane which resulted in the wreck. I made an inspection of the air brakes on that train after she came in from Spokane on that trip. When she backed in from the wye and stopped on the Hayden Lake track I looked over the train for leaks,

(Testimony of William W. Moffitt)

applied the brakes, made a slight application, went down and looked under each car to see if the brakes would leak off, went up into the cab and released the brakes, and then made an ordinary service application to see if the brakes would hold in service, released the brakes and went down under the train to see if they released properly. I found them in perfect working order. During the land registration rush, I made such an inspection of every train that came in.

CROSS EXAMINATION.

It took me two or three minutes to make the inspection. I made what is called a terminal inspection, what is required of a train before leaving a terminal. The air brake system was composed of a motor-driven air compressor, the main reservoir which receives the supply from the compressor, an auxiliary reservoir, which is a storage tank for air, a brake cylinder and triple valve and brake valve. I didn't inspect all those portions of the air brakes. I simply made an inspection to see that the brakes applied properly and released properly, that is a terminal test. I didn't go through and inspect the motor-driven air compressor. I looked at the gauge to see if it was running properly. If a fuse had blown, or anything else, it would show on the gauge that the generator was not working properly. Mr. Bowdish, I believe, was on the ground. He generally kind of glanced over trains as well as I did, and if there

(Testimony of William W. Moffitt)

had been any fuse blown or anything else I always told him regarding that. I don't remember seeing Mr. Campbell or Mr. Whittlesey. I did not see Mr. Campbell in the cab. I got in the cab through the side door of the cab and applied the air.

(Testimony of ----- Mahonn)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am general foreman of defendant's shops; was in the employ of the company at the time of the Gibbs wreck. I was acquainted with Motor No. 5 that was in the wreck. It was so demolished that it was never used again. The company has in its service now a motor of the same equipment, size, and everything that that motor had, with one exception, the controller on Motor 5 had the Westinghouse L4 drum type of controller; Motor No. 4 is the same as Motor No. 5 was in everything except that it has the K14 controller. The controller is the apparatus by which the electric current is worked. The air equipment on the two motors was the same.

The trailers which were with No. 5 at the time of the wreck had air equipment. The trailers were the same as the motor except that they did not have a motorman's cab, and were not equipped with a brake valve, but outside of that the equipment, the size of the cars, etc., were identical.

CROSS EXAMINATION.

Motor 5 did not have a side door to the cab; it had windows on the side.

(Testimony of — Mahonn)

RE-DIRECT.

Motor 5 was divided into three compartments: First, a little cubby-hole where the motorman sits, then there was a door opening into a larger space, which was the baggage room, and then another door opening from that into a third space, where the passenger seats were.

(Testimony of Henry John Robinson)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am mechanical expert for the Westinghouse Air Brake Company, and have been such for seven years. With Mr. Mahonn I examined Motor No. 4 of the defendant company. I found it equipped with the Westinghouse Standard Automatic air brake, such as is in general service all over the country on passenger equipment. It is what is known as the automatic type. Anything that will cause a reduction of the pressure which is carried in what is known as the brake pipe extending from one end of the car to the other will cause the brake to apply. It applies when a reduction of brake pipe pressure is made either by the motorman with the motorman's brake valve, or by the conductor with what is known as the conductor's valve in each car, or by the train parting, or the brake pipe connections being broken in any manner. There is a brake valve in the motorman's cab by which the motorman has control of the brakes and by moving the valve to application posi-

(Testimony of Henry John Robinson)

tion it vents this brake pipe pump. Under each coach there is a pressure store. Each coach has its own pressure store, or what we term an auxiliary reservoir, and as the brake vent pressure is applied, or if the brake in one coach was for any purpose cut out or inoperative, the brakes on the other coaches are still serviceable and can be used. The only manner in which the brakes will apply is by the venting of the brake pipe pressure which may be caused by the moving of the motorman's valve, the opening of the conductor's valve, or the breaking of pipes under the cars, or the hose between the cars. If the pipe under the car is broken, or the hose is broken, the brakes forthwith set and neither the motorman or conductor can keep them from setting. Each car has a complete system of its own, and if the brakes on one coach are out of order, it does not affect the work of the brakes on the other coaches. If the brakes on a train of three cars of the sort that I have described were in working order on a trip and if at the terminal they were inspected by setting and found to be in working order, there is only one way in which they would refuse to work and that is by having the connections between what we term the auxiliary reservoirs and the brake cylinder in all of the cars broken. It would have to break in each individual car to make that individual brake inoperative. To my knowledge there is nothing that could happen

(Testimony of Henry John Robinson)

to these brakes that would cause them to refuse to work in emergency. The Westinghouse Company has an air brake instruction book. When a test has been made, I know of nothing that would cause a brake under the stated conditions to refuse to work in an emergency. When no test has been made, there are things. There might be an obstruction in the brake pipe between one car and another which would prevent the motorman from applying the brake on the vehicle back of such obstruction. That is the reason why it is customary to make what we call a terminal test of the brakes, that is, all brakes must be tested before they leave the terminal, and that test is for the purpose of finding out if there is any such obstruction. (Thereupon the following examination of the witness occurred:)

Q. Now, suppose, Mr. Robinson, that the train was running along and the motorman threw it into emergency and the brakes took hold, would it be possible for those brakes to take hold and hold for thirty or forty feet and then release; and, if it would be possible, state what would have to happen before that would take place?

A. It might happen if the pipe—if for any reason the pipe between the auxiliary reservoir and the pipe on each coach were broken. In that event the storage reservoir would be vented automatically and would not be available. The other means by which they would not hold is by the en-

(Testimony of Henry John Robinson)

gineer accidentally pulling the handle of the brake valve into release position, not intentionally, but accidentally. If he did that, of course, the brakes would release because the valve is there for that purpose, to enable the motorman to release the brakes.

Q. Those are the only two things that could do it?

A. And there is another thing that could do it and that is—I said breaking the pipe between the auxiliary and the brake cylinder, breaking the cylinder itself or breaking the reservoir, would have the same effect, of course. And the brake cylinder is constructed in such a manner that it is necessary to have a packing in the cylinder. If that packing is blown out entirely of course the brake would leak off. But if there was no other breaks the leakage would be so slow that the stop would be made before the brakes would leak off in cases of that kind, but that is the only point which is covered by the inspection.

Q. Now, Mr. Robinson, so that it may be perfectly clear, in order for the breaking of the auxiliary pipe to cause that release, they would have to break all the separate pipes under each car, separately?

A. Yes, sir.

Q. And each pipe under each car would have to break?

A. Yes, sir.

(Testimony of Henry John Robinson)

Q. If just one broke it would not affect it?

A. It would affect that particular car only.

Q. But not the other cars?

A. No, sir.

Q. Of course if the cylinder would burst, I suppose that would do it, the main cylinder?

A. If the cylinder or auxiliary reservoir, that of course is connected with the pipe and would have the same effect.

Q. What is this cylinder, what is it made of?

A. Cast iron.

Q. What is its size, thickness, dimensions and what is it—

A. (Interrupting) It is made to withstand much greater pressure than is ever used. I have never known of one breaking in service.

Q. Tell about the other, the auxiliary cylinder?

A. The auxiliary cylinder is also constructed to carry much higher pressure than is used, all tested at the works under Government specifications.

Q. Have you ever known one of them to burst?

A. No, sir.

Q. Ever hear of any of them bursting?

A. Never heard of one.

Q. Now, the only other thing you say would be the packing coming out?

A. Yes, sir, the packing in the cylinder.

Q. And that would cause it to leak?

A. Cause it to leak off, yes.

(Testimony of Henry John Robinson)

Q. But that would be so slow the train would have stopped before it would leak away?

A. Yes, sir, because it would have to leak out all the pressure which is in the storage reservoir under the car, because in emergency the storage reservoir is connected directly to the brake cylinder.

Q. Now, Mr. Robinson, did you ever know of a set of brakes which would work in ordinary operation refusing to work in emergency?

A. I never knew of an automatic brake—

Q. That is what I mean.

A. That would refuse to work in emergency. In fact, it is not the general rule when inspecting brakes to use the emergency.

Q. Why?

A. Because if the brake will work in service, it is a foregone conclusion it will work in emergency. In fact, the most of our trouble is that they work in emergency when we only want them to work in service.

Q. Just explain what you mean by that now?

A. I mean by that very often when a man is desiring only to make a service stop, make a service, all of the brakes will go into emergency, what we call undesired emergency, something which we have a lot of trouble in overcoming.

Q. You never have had any trouble with one that were worked in service refusing to go into emergency?

A. No, sir. The only time that could happen

(Testimony of Henry John Robinson)

is in a long freight train where there are so many cars cut out that what we call the quick action can not jump, but in a short train never.

Q. Mr. Robinson, I want to state a hypothetical question and ask you if it would be possible to occur except from the happening of the things you have stated: Suppose a train of three cars, a motor and two trailers equipped as the one you saw, No. 4, starting operating at six-thirty in the morning from Spokane, going to Coeur d'Alene from Spokane and returning to Spokane, going to Coeur d'Alene from Spokane and returning to Spokane, a distance of approximately thirty miles, then going from Spokane to Coeur d'Alene, there being inspected and found all right, assuming that the brakes were working perfectly on two trips and a half, and that the train left the station at Coeur d'Alene, traveled about a mile and a half at a rate of approximately thirty miles an hour, twenty-five or thirty miles an hour, would it be possible under those conditions, the brakes working perfectly all this time, would it be possible under those conditions, if it were thrown into an emergency, for the emergency to hold thirty or forty feet, and then release entirely and let the train shoot ahead for a distance of six hundred feet the same as though the brakes had not been put on?

A. Not unless, as I stated before, the pipe connections under the car that I specified, were broken.

Q. The pipe connections under the car?

(Testimony of Henry John Robinson)

A. Under each car, yes, sir.

Q. They would all have to break at once, wouldn't they?

A. Yes, sir. If the one on the head car broke and the other two did not, the brakes on the other two cars would stop the train.

Q. Did you ever hear of a thing happening, and all of these pipes under each car breaking at once?

A. No, sir, I never did.

Q. Would it be practically possible for that to happen?

A. No, sir.

CROSS EXAMINATION.

The brake is operated by venting what we know as brake pipe pressure. It relieves the pressure on what is known as the brake pipe, but there is stored under each car air for operation or for applying the brake on that car. This is compressed air, usually thirty pounds to the square inch gauge pressure, atmospheric pressure. Atmospheric pressure is not quite fifteen pounds. Gauge pressure does not show any pressure until you have exceeded the atmospheric pressure. We count fifteen absolute as nothing. When we speak of seventy pounds, or seventy-five pounds, that is gauge pressure, so much above the ordinary pressure. On the motor-car there is what we know as the compressor. It is really a pump, what we call an air pump; that is only on the motor-car.

(Testimony of Henry John Robinson)

It supplies the air for the auxiliary reservoir, and if the pump does not work, then there is no compressed air. The air in the auxiliary reservoir is what supplies the pressure used in the brake cylinder. It is the force used. The application of the brakes means turning that force loose against the wheel or against the brake. If the pump was out of order in the motor-car, it does not necessarily affect each one of the auxiliary reservoirs alike. If there is air already in the auxiliary reservoirs and the pump stops, the pressure leaks down in the storage reservoir when this motor does not operate, and the compression applied to the brake would be applied automatically by reason of this leakage on account of the valve mechanism under each car being sensitive for that purpose. There is just as heavy an application of the brakes if the motor was not running and pumping as if it was. Since the application depends upon the pressure which is in the auxiliary reservoir. In the event that the reservoirs were filled up and the pump was disabled for some reason, the brakes would leak on when the pressure would be down. That is why it is called an automatic brake. When I speak of the brake leaking off, I mean that if the packing leather in the brake cylinder is leaking, the brake could leak on and then leak off of that particular car. It would leak off slowly, but it could leak off if that packing leather was defective. The length of time it would take to leak

(Testimony of Henry John Robinson)

off would depend upon the extent of the defect. The packing is composed of specially treated leather, which is air tight. In ordinary service it will last anywhere from eighteen months to eight or ten years. Anyone who has mechanical ability and grasps the principles readily can understand the air brake system, for the principle is simple. The idea is that you have to have vent pressure in the brake system in order to obtain pressure at the brake shoes. I examined Motor 4 about ten minutes. I operated it standing, looked it over to see what kind of equipment was on it, went into the cab and operated it to see if the brakes would release and apply, and found it operated properly. (One of the Westinghouse Company's instruction books was thereupon shown the witness and identified by him.) There is what we call a whistle reservoir on this which there is not on the other; otherwise, it is the same. This whistle reservoir is not usually used. The other differences are that the apparatus shown in this book is what we know as a combined apparatus, whereas on the car in question it is the detached, the only difference being that in the illustration the brake cylinder is connected directly to the auxiliary reservoir, but that in the car is not connected directly but by means of a pipe. The compressor is indicated by the letter "A." It is operated by means of an electric motor attached to the compressor by means of a gear. The power to

(Testimony of Henry John Robinson)

operate the motor comes from the trolley. It comes through a motor at each end of the car so that it can be placed at either end of the car, and then power comes through this wire, through a fuse box, and through what we call a generator, and when that generator is cut in the electricity goes through the motor and from the motor down to the generator so as to make a complete circuit and turn the motor. After the air leaves the compressor, it goes to a main storage reservoir, and there is a pipe from the main reservoir which goes to the motorman's brake valve, and with the motorman's brake valve in what we call the release position, the air is then free to go to what we call the brake pipe. The brake pipe is connected throughout the length of the train by these hose couplings, and under each coach there is what we call a branch pipe from the brake pipe which leads over to what we call the triple valve. It is so named because it performs three functions, charges the auxiliary reservoir, supplies the brakes and releases it. The air from the pipe goes through this triple valve, through the auxiliary reservoir, past a very small opening which allows the pressure to pass in the auxiliary reservoir very slowly. Under certain conditions water might form in that reservoir, but it is very, very seldom. When it does, it comes from the auxiliary reservoir over into the brake cylinder, and when the brake is released it is vented off. It is not cleaned out by

(Testimony of Henry John Robinson)

any other method because the only other way in which there is an opening to that auxiliary reservoir is on top in this case. On the car in question there is a cock at the bottom for the purpose of bleeding the brake off, that is, releasing the brake by that means when it is desired. It is not put there for the purpose of cleaning out the reservoir. It could serve that purpose. If there is any water in it it will drain through that cock. Dirt or dust never gets in there. The air from the pump goes through a strainer before it goes over to the auxiliary reservoir. There is a strainer in the pump to prevent the dirt getting in the compressed air. If dirt got in the compressed air, it would probably make the triple valve so it would not release so readily as otherwise. If the triple valve does not release, the brake remains applied. If the compressor had not been working, there would nevertheless have been pressure in the auxiliary reservoir if there was pressure in there when the terminal test was made at Coeur d'Alene. If no terminal test was made at Coeur d'Alene it would be strictly up to the motorman for not knowing there was no air in the system. There is a possibility of there being absolutely no compressed air if there is no test made to indicate it, or if the brakes had not been used prior to the time it was desired to use it. If the reservoir was full and the motorman makes an application or two, and his pump is not working, it depletes the pressure

(Testimony of Henry John Robinson)

to the extent that he uses it. If there is no way to replace it, it is weaker than at the first application. The exhaustion of the air would depend upon the number of applications he makes. The reservoir is such size that when it is full you can make several applications and releases before it is entirely depleted. If when a motorman applies the brakes there is sufficient air to set them, they would not let loose again because the reservoir was exhausted. After the brakes are once set, the motorman must release them. They would not let loose just because the pressure was not working. I have known cases of individual cars where they have leaked off owing to the fact that I spoke of before, the packing leather being deficient. They leaked off gradually, but of course that affected only the one individual car the leak existed on. If the brakes were in perfect working condition, a motor car and two trailers full of people going at a speed of thirty miles an hour on a one per cent down grade, an application of the brakes in the emergency would stop the train, in my opinion, in between 200 and 300 feet, not more than 300, and I doubt if less than 200. Five miles an hour variation in speed would cause a variation of distance in the stop of the emergency between five and fifty feet. It is my opinion that at thirty-five miles an hour on a one per cent down grade, if the brakes had been in first class working condition, the three cars loaded with people would have

(Testimony of Henry John Robinson)

stopped within 300 feet after the application. The auxiliary reservoirs will not be recharged until the controller of the brake valve is placed in a release position. There could be no recharging of them until the valve handle is placed in release position. A recharging of that equipment would take about ten seconds.

RE-DIRECT.

A motorman can tell whether his pump is working. He has a gauge in the cab which indicates whether he has the pressure. He can also hear the pump working. When the car is running he can hear it. The motorman's gauge is located in different places, but it is usually in front of him as he is facing his work. If he is facing his controller, he can tell whether he has got air pressure or whether his pump is working, and if it would not work, he would know it right away. That gauge will indicate whether he has pressure or not, and exactly what the pressure is. The pump is governed automatically. There is a governor which stops the pump when the predetermined pressure is reached and starts it when that pressure falls a certain amount. The pump automatically cuts off when the proper amount of pressure has been obtained in the storage reservoir, and when the pressure in the storage reservoir has been reduced a certain amount it automatically cuts in the pressure, and the pump goes to work and restores the pressure which has been used.

(Testimony of Henry John Robinson)

The gauge I spoke of is just an ordinary pressure gauge such as is used on steam boilers and the motorman can tell by glancing at it whether he has got air. He does not have to make a test to see whether he has air or know whether his pump is working. The only object in making the test would be to know whether the brakes are in operating condition. If the brakes operated when he came in and operated again when he set them so as to hold for thirty or forty feet, I know of only two things that would cause them then to release, breaking connections to the brake cylinder, that is, the auxiliary reservoir or the brake cylinder itself, or putting the brake valve in release condition. I mean by that breaking the connection to the cylinders in each car. The breaking of the auxiliary reservoir or its connection with the brake cylinder on each particular car would affect that car only.

RE-CROSS EXAMINATION.

You can break the pipe on the motor car, break the storage pipe reservoir on the motor car and the brakes will apply on all of the cars. That is why it is termed automatic. They will vent the pressure in the storage reservoir, and that in turn being connected with the brake pipe pressure will vent the brake pipe pressure, which is all that is necessary to apply the brakes. They will not release automatically because they are not designed to work that way. There was a device on this car

(Testimony of Henry John Robinson)

called a generator. Whenever the predetermined amount of pressure in the storage reservoir is reached it automatically acts to shut down the compressor, and then that same device starts it up again when the pressure gets to a predetermined lower level. With this equipment, the storage reservoir pressure is supposed to be higher than the brake pipe pressure. I don't know what the pressure is in this particular car, but under usual conditions the pressure should start when the storage reservoir pressure reaches eighty-five pounds, and then it should cut out when it reaches one hundred pounds, so that there should be less than eighty-five pounds pressure in the storage reservoir. Of course, any mechanical device may get out of order and fail to work, although the fact that that device is on all the motor cars in the United States and Canada at the present time is an indication that it is a very reliable device. If it got out of order it might fail to start the compressor. There is usually no difference between the adjustment of a brake on a loaded car and on an empty car. The difference is that on a loaded car the brake is not as effective as on an empty car, the difference in effectiveness depending upon the load, the original weight of the car, and the load in the car. There is no law of variation there. So many conditions entering into it, there is really no law that will tell the difference except the percentage of breaking power. The

(Testimony of Henry John Robinson)

way the per cent is figured out, that is, on a light car, we figure the braking power should equal the weight on the wheels. Pounds pressure at the brake should equal the weight on the wheels and as the weight on the wheels increases and the percentage of breaking power does not increase, it is easily to be seen that the braking per cent is less on a loaded car than it is on a light car.

RE-RE-DIRECT EXAMINATION.

If the generator failed to work, the motorman could have seen it in his gauge. The gauge is put there for that purpose. If his air is not working all he has to do is to use his eyes and tell it.

IN REBUTTAL.

(Testimony of Edgar E. Campbell)

Plaintiff went upon the stand and testified as follows:

I didn't see the car inspector Moffit in my cab at Coeur d'Alene before I started on the return trip to Spokane.

Thereupon, both parties rested, and defendant requested the court to give to the jury the following instructions:

"If you find from the evidence that the plaintiff left Coeur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake,

that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant.

“If you find that before leaving Coeur d’Alene plaintiff received train order No. 53 reading as follows:

‘Train Order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene station.

Motor 5 will run Spl C D Alene to Spokane meet special 4 east at Alan’

and left Coeur d’Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant.

“I charge you that if the plaintiff left Coeur d’Alene in violation of the orders which he had, recklessly, or wilfully, or with such gross negligence as would amount to recklessness or wilfulness, that then and in that event the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely upon the brakes, and in that event your verdict should be for the defendant.”

The court failed and refused to give such instructions as requested by defendant, and he charged the jury as follows:

“This is an action to recover damages for personal injuries suffered by the plaintiff through

the alleged negligence of the defendant company. It is admitted in the pleadings that the defendant is a corporation organized and existing by virtue of the laws of this state, and on the 31st day of July, 1909, was a common carrier of passengers in interstate commerce between the city of Spokane, in the state of Washington, and the town of Coeur d'Alene, in the state of Idaho. It is further admitted that on the 31st day of July, 1909, the plaintiff was employed by the defendant as a motorman and had charge of and was operating Special Number 5 from the town of Coeur d'Alene to the city of Spokane. It is further admitted by the plaintiff in his testimony that he had no right to leave Coeur d'Alene with his train on the occasion in question without written orders, and that the order of the conductor directing him to depart would not authorize him to do so. It is likewise admitted that the plaintiff had no right to depart from Coeur d'Alene until train Number 20, with which he collided, arrived at that place unless he had written order for a meeting with Number 20 at some other point.

The allegations of negligence are contained in the fourth and fifth paragraphs of the third amended complaint. The fourth paragraph avers that the agents, officers and employees of the defendant company ordered and directed the plaintiff to take his train Number 5 and to proceed from the town of Coeur d'Alene to the city of Spokane, and to meet train Number 20 at the town of Alan;

that when rounding a curve near the station of Gibbs, in the state of Idaho, which is a point between Coeur d'Alene and the town of Alan, the plaintiff saw a train coming in the opposite direction on the same track, which the plaintiff is informed and believes was train Number 20. The fifth paragraph alleges that upon coming in view of train Number 20 the plaintiff used all due diligence to bring his motor upon train Number 5 to a stop; that he duly applied the air brakes upon the motor, but owing to the defective condition of the air brakes, which condition was wholly unknown to the plaintiff, the air brakes wholly failed and refused to act and the plaintiff's said motor and train rushed forward at a tremendous rate of speed and collided with regular train Number 20. The sixth paragraph avers that the collision or accident was directly chargeable to the wrongful and negligent acts of the plaintiff's superiors in giving improper orders, and in their failure to furnish the plaintiff with a motor and train supplied with proper air brakes and in good working condition.

These allegations of negligence contained in the third amended complaint are denied by the answer.

At the outset I charge you as a matter of law that the collision between these two trains was the result of gross and almost criminal negligence on the part of some officer or agent of the defendant company, and if you find from a preponderance of the testimony, that is, from the greater weight

of the testimony, that the written orders delivered to the plaintiff directed him to take his train out of Coeur d'Alene city and to meet regular train Number 20 at Alan, such negligence was not the negligence of the plaintiff, but of some officer or agent of the company, for whose acts the company is responsible, and your verdict will be for the plaintiff in such sum as you deem him entitled to without considering any other questions in the case. If, on the other hand, the plaintiff's orders were those offered in evidence by the defendant and directed the plaintiff to meet Special Number 4 east at Alan and not Regular Number 20 at that point, the negligence causing the collision was the negligence of the plaintiff and will bar a recovery as to the charge of negligence based on the delivery of improper orders. And if you find from the testimony that the plaintiff disobeyed the written orders delivered to him, and that such disobedience of orders was the direct and proximate cause of the injury to the plaintiff your verdict will be for the defendant. If, on the other hand, you find from a preponderance of the testimony that the air brakes on the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was the direct and proximate cause of the collision, or contributed directly and proximately to the collision, and to the injury to the plaintiff, your verdict will be for the plaintiff.

I will define to you "proximate cause" in the language of the Supreme Court of the United States:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question of fact for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster though it may operate through successive instruments as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. The question always is was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent act intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances."

What, then, was the proximate cause of this collision? Was it a disregard or disobedience of orders on the part of the plaintiff, if you find he disobeyed the orders given, or was it defective air brakes? You must determine this question from all the facts and circumstances given in evidence. You have a right to consider the fact that the air brakes worked properly at all times during the day up to the moment of the accident; the time that elapsed between the application of the brakes and the collision; the manner in which the brakes were applied and operated as disclosed by the testimony, and all the facts and circumstances appearing before you. And before you can return a verdict for the plaintiff based on the allegation that the brakes were defective and out of repair, you must be satisfied from a preponderance of the testimony not only that the brakes were in fact defective or out of repair, but that their defective condition was the direct or proximate cause of the collision, as I have defined that term to you. Your verdict cannot be based upon mere guesswork or speculation. You must be able to say from a consideration of all the testimony that the testimony tending to show that the brakes were defective or out of repair, and that such defect was the proximate cause of the injury, outweighs or preponderates over the testimony tending to show the opposite conclusion.

I further instruct you that the fact that the conductor on the train may have been guilty of

negligence in permitting the train to pass the "Y" is immaterial in this case and gives no right of action to the plaintiff. So is the fact that the orders were not signed by the conductor or motor-man, and the fact that they were not delivered to the conductor directly by the train dispatcher. In other words, the material inquiry here is, what orders did the plaintiff in fact receive, and did he obey or disobey these orders.

I further instruct you that you must not be influenced by pity or compassion for any injury that the plaintiff has received, but you should judge of this case upon the evidence solely without any reference to other considerations. You will weigh the evidence in a calm, dispassionate, cool-headed manner and reach a conclusion from that, and from that alone.

As I have already instructed you, the burden of proof is upon the plaintiff to establish the material allegations of the complaint by a preponderance of the testimony. If upon any issue the testimony preponderates in favor of the defendant, or is evenly balanced, it will be your duty to find such issue in favor of the defendant. On the other hand, if the testimony preponderates in favor of the plaintiff on the issues which I have submitted to you, your verdict will be for the plaintiff and you will proceed to fix the amount of his recovery.

You, gentlemen of the jury, are the sole judges of the facts in this case, and of the credibility of the witnesses. Before arriving at your verdict

you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is shown; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing those facts; the probability of the truth of their testimony; their bias or prejudice or the absence of either of these qualities; and all other facts and circumstances given in evidence or surrounding the witnesses at the trial.

I further instruct you that if you find from the testimony that any witness has wilfully testified falsely to a material fact you are at liberty to disregard the testimony of that witness entirely except in so far as he or she may be corroborated by other credible testimony or by other known facts.

I further instruct you that under the law a complaint is required to be verified either by the plaintiff or by his agent under certain circumstances. If you find from the testimony that the plaintiff has wilfully sworn to some material fact which he knew to be untrue, or to something of which he had no knowledge or belief in regard to the contents of the complaint, you have a right to take that fact into consideration in determining the weight of his testimony.

I further charge you, that if the plaintiff in his original complaint in this case has alleged any

material fact or facts contrary to which he has testified here, or omitted to allege any essential or material fact, which he has testified to on the trial, you may take that fact into consideration in passing upon his credibility and the weight of his testimony.

If you find for the plaintiff it will be incumbent upon you to fix the amount of his recovery. This you cannot do in dollars or cents. The law from necessity leaves that question largely to your good sense and sober judgment. You will fully compensate him for any pain and suffering he has endured in the past by reason of this accident or injury, and for such pain and suffering as you find that he will endure in the future. You will compensate him for whatever loss he has sustained through the impairment of his earning capacity in the past and for such loss as he will sustain through the impairment of his earning capacity in the future. These several items will go to make up the amount of your verdict in the event you find for the plaintiff, which amount will be limited by the prayer of the complaint.

In addition to the general form of verdict, gentlemen of the jury, I submit to you three separate findings, one is: "Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?" You will answer that question Yes or No.

The second is: "Did the plaintiff, Campbell,

receive, before leaving Coeur d'Alene, train order No. 53, reading as follows: 'Train order No. 53, from Spokane, 7-31-1909. To motor 5 at C. D. Alene station. Motor 5 will run spl. C. D. Alene to Spokane, meet special 4 east at Alan.' You will answer that question Yes or No.

The next question is as follows: If you find that the plaintiff left Coeur d'Alene in violation of his orders, then answer this question, was that leaving in violation of his orders the proximate cause of the accident?"

To place the issues in this case before you in concrete form, gentlemen. The questions presented for your consideration are rather simple. One is, did the plaintiff take his train out of Coeur d'Alene city on that night in violation of the written orders given him by the conductor? If he did, he was guilty of negligence, and if that negligence was the direct and proximate cause of his injury he has no right of action here. The next question for your consideration will be this: Were the air brakes on this motor and train defective? If you find from a preponderance of the testimony that they were, the next question is, was such defect the direct and proximate cause of the injury to the plaintiff? If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff, and it only remains to assess the amount of his recovery. The principal and vital question in the case is one of proximate

cause, aside from the two issues, as to whether or not the orders were disobeyed and whether or not the air brakes were defective. You may now retire.

Gentlemen of the jury, some of you may not have sat on a jury in this court before. It requires the concurrence of all twelve of your members to return a verdict, either for the plaintiff or for the defendant. You may now retire."

And thereupon the defendant excepted to the portions of the charge given by the court and to the court's refusal to charge as requested by the defendant as follows:

Defendant excepts to that portion of the charge given to the jury in this cause which reads as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision and that the defective condition of the air brakes was the direct and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

Defendant excepts to that portion of the charge which authorized the jury to inquire whether the proximate cause of the collision was the disobedience of orders by the plaintiff, or whether it was defective air brakes.

Defendant excepts to that further portion of

the charge to the jury which submitted to the jury the question of whether the defective condition of the air brakes, if they were found to be defective, or out of repair, was the direct or proximate cause of the collision, as the term was theretofore defined to them.

Defendant excepts to that portion of the charge which, after having stated that the one question presented to them was whether the plaintiff took his train out in violation of the written orders, then proceeds as follows:

“The next question for your consideration will be this: ‘Were the air brakes on this motor and train defective?’ If you find from a preponderance of the testimony that they were, the next question is: ‘Was such defect the direct and proximate cause of the injury to the plaintiff?’ If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff and it only remains to assess the amount of his recovery.”

Defendant excepts to the refusal of the court to give the following charge which was requested in writing by the defendant, to-wit:

“I charge you that if the plaintiff left Coeur d’Alene in violation of the orders which he had, recklessly or willfully or with such gross negligence as would amount to recklessness or willfulness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance.

Under those circumstances the plaintiff could not rely on the brakes and in that event your verdict should be for the defendant.”

Defendant excepts to the refusal of the court to give the following instruction which was requested by the defendant, to-wit:

“If you find from the evidence that the plaintiff left Coeur d’Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant.”

Defendant excepts to the refusal of the court to give the following instruction, which was requested by the defendant, to-wit:

“If you find that before leaving Coeur d’Alene plaintiff received train order No. 53 reading as follows:

‘Train order No. 53.

From Spokane 7-31-1909.

To motor 5 at C. D. Alene Station

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan’

and left Coeur d’Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in

sight of No. 20, then I charge you to find for the defendant."

The above exceptions having been duly taken and noted in his minutes by the court, the jury retired to consider of their verdict, and thereafter returned into court with a verdict in plaintiff's favor and awarding him damages in the amount of seventy-five hundred dollars. With such verdict in the plaintiff's favor, the jury at the same time returned the interrogatories submitted to them by the court, with answers thereto as follows:

"Interrogatory No. 1. Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?

Answer to Interrogatory No. 1. Yes.

Interrogatory No. 2. Did the plaintiff, Campbell, receive, before leaving Coeur d'Alene, train order No. 53, reading as follows:

'Train order No. 53, from Spokane, 7-31-1909. To motor 5 at C. D. Alene station. Motor 5 will run spl. C. D. Alene to Spokane, meet special 4 east at Alan.'

Answer to Interrogatory No. 2. Yes.

Interrogatory No. 3. If you find that the plaintiff left Coeur d'Alene in violation of his orders, then answer this question, was that leaving in violation of his orders the proximate cause of the accident?

Answer to Interrogatory No. 3. Yes."

Thereafter the defendant duly filed its motion

in writing herein for the entry of judgment in its favor upon the special findings of the jury, notwithstanding the general verdict in plaintiff's favor, which motion was as follows:

“Defendant moves the court to enter judgment in its favor herein, denying plaintiff relief and dismissing his action, notwithstanding the general verdict returned in his favor by the jury empaneled in this cause, upon the ground and for the reason that the special verdicts or findings returned by the jury in answer to the interrogatories submitted to them by the court are inconsistent with the general verdict in plaintiff's favor, and entitles defendant to judgment as herein moved.”

Such motion was by the court denied and defendant excepted to such ruling, and its exception was allowed.

Thereupon the defendant filed in court its petition for a new trial, which petition was as follows:

“Defendant prays the court to grant it a new trial in the above entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict, such insufficiency consisting in the following matters, to-wit:

- (a) The evidence showed and the jury have found that plaintiff was injured by reason of his violation of his orders in leaving Coeur d'Alene without having orders against regular train No. 20.

- (b) The evidence shows and the jury have

found that such violation of orders was the proximate cause of plaintiff's injury.

(c) The evidence shows that there was no defect or insufficiency in any particular in the brakes on plaintiff's train.

(d) The evidence shows that though it be held there was some evidence that the brakes upon plaintiff's train were defective or insufficient in any way, nevertheless such defect or insufficiency was not the proximate cause of plaintiff's injury.

2. That the verdict in plaintiff's favor is against the weight of the evidence and should be set aside for that reason.

3. The verdict in plaintiff's favor is against the weight of the evidence and contrary to the special findings made by the jury.

4. Errors in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(a) The admission of evidence relating to the failure of the brakes to work.

(b) The giving of that portion of the charge to the jury which reads as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision and that the defective condition of the air brakes was a direct and proximate cause of the collision or contributed directly or approximately to the collision and to

the injury of the plaintiff, your verdict will be for the plaintiff.”

(c) The giving of that portion of the charge which authorized the jury to inquire whether the proximate cause of the collision in which plaintiff was injured was the disobedience of orders by the plaintiff, or whether it was defective air brakes.

(d) The giving of that further portion of the charge by which there was submitted to the jury the question of whether the defective condition of the air brakes, if they were found to be defective or out of repair, was the direct or proximate cause of the collision as the term was theretofore defined to them.

(e) The giving of that portion of the charge which, after having stated that the one question presented to them was whether the plaintiff took his train out in violation of the orders, then proceeded as follows:

“The next question for your consideration will be this: ‘Were the air brakes on this motor and train defective?’ If you find from a preponderance of the testimony that they were, the next question is: ‘Was such defect the direct and proximate cause of the injury to the plaintiff?’ If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff and it only remains to assess the amount of his recovery.”

(f) The refusal of the court to give the following charge requested in writing by defendant, to-wit:

“I charge you that if the plaintiff left Coeur de’Alene in violation of the orders which he had, recklessly or willfully or with such gross negligence as would amount to recklessness or willfulness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely on the brakes, and in that event your verdict should be for the defendant.”

(g) The refusal of the court to give the following charge requested in writing by the defendant, to-wit:

“If you find from the evidence that the plaintiff left Coeur d’Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant.”

(h) The refusal of the court to give the following charge requested in writing by the defendant, to-wit:

“If you find that before leaving Coeur d’Alene plaintiff received train order No. 53, reading as follows:

“Train Order No. 53.

From Spokane, 7-31-1909.

To Motor 5 at C. D. Alene Station.

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 East at Alan.”

and left Coeur d’Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant.”

The foregoing petition will be heard upon the pleadings and papers on file, and upon the minutes of the court.”

Such petition was denied, to which ruling the defendant excepted, and its exception was allowed. Thereupon, on motion of plaintiff’s counsel, judgment was entered in plaintiff’s favor upon the general verdict in that behalf returned by the jury for damages against defendant in the amount of seventy-five hundred dollars.

And now in furtherance of justice, and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in this case to the action of the court, and prays that the same be settled, allowed, signed, and sealed by the Court, and made a part of the record in this case, and the same being in all respects regular and containing all material facts not already a part of the record herein, and having been duly and timely served and filed, the same is accordingly settled, allowed, signed and sealed

by the court and made a part of the record in this case on this 1st day of December, 1913.

(Signed) FRANK H. RUDKIN,
District Judge.

Service of the within Bill of Exceptions is hereby acknowledged the 18th day of November, 1913.

Endorsements: Bill of Exceptions

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Received at the Clerk's Office, November 19, 1913, and filed in the U. S. District Court for the Eastern District of Washington, after being settled and allowed by the Court, December 1st, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL, *Plaintiff,*

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, *Defendant.*

ASSIGNMENTS OF ERROR.

Comes now the above named defendant, Spokane & Inland Empire Railroad Company, and in connection with its Petition for Writ of Error makes the following Assignments of Error which it avers were committed by the court in the trial of this cause and upon which it will rely in its prosecution of the Writ of Error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

First: The Court erred in denying defendant's motion to enter judgment in its favor, denying the plaintiff all relief and dismissing his action notwithstanding the general verdict returned in plaintiff's favor by the jury herein, for the reason that the special findings returned by the jury in answer to the interrogatories submitted to them by the Court were inconsistent with the general verdict in plaintiff's favor, and entitled defendant to judgement denying plaintiff's relief and dismissing the action. Such inconsistencies consisted in that (a) the special findings made by the jury show that at the time plaintiff was injured he was acting without the scope of his employment;

that he was acting in violation of defendant's rules and violated the orders given him, and that he was in the commission of an unlawful act.

(b) The special findings show that the sole and proximate cause of his injury was his violation of the rules and orders of the company, and his own unlawful act. (c) That the special findings show that plaintiff was not injured by reason of any breach of any duty which the defendant owed to him at the time he was injured.

Second: The Court erred in charging the jury as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was a direct and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

Third: The Court erred in giving that portion of the charge to the jury which authorized the jury to inquire whether the proximate cause of the collision, out of which grew this action, was the disobedience of orders by the plaintiff or defective air brakes.

Fourth: The Court erred in giving that portion of the charge to the jury whereby there was submitted to the jury the question of whether

the defective condition of the air brakes, if they were found to be defective or out of repair, was the direct or proximate cause of the collision.

Fifth: The Court erred in giving that portion of the charge to the jury whereby the jury were charged as follows:

“The next question for your consideration will be this: Were the air brakes on this motor and train defective? If you find from a preponderance of the testimony that they were, the next question is: Was such defect the direct and proximate cause of the injury to the plaintiff? If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff, and it only remains to assess the amount of his recovery.”

Sixth: The Court erred in refusing the give the jury the following charge requested in writing by the defendant, to-wit:

“I charge you that if the plaintiff left Coeur d’Alene in violation of the orders which he had recklessly or willfully or with such gross negligence as would amount to recklessness or willfulness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely on the brakes, and in that event your verdict should be for the defendant.”

Seventh: The Court erred in refusing to charge the jury as requested by the defendant, as follows, to-wit:

“If you find from the evidence that the plaintiff left Coeur d’Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant.”

Eighth: The Court erred in refusing to charge the jury as requested by the defendant in writing, as follows, to-wit:

“If you find that before leaving Coeur d’Alene plaintiff received train order No. 53, reading as follows:

“Train Order No. 53.

From Spokane, 7-31-1909.

To Motor 5 at C. D. Alene Station.

Motor 5 will run Spl. C. D. Alene to Spokane meet Special 4 East at Alan.”

and left Coeur d’Alene after receiving and reading and knowing the contents of said order, and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant.”

Ninth: The Court erred in denying the defendant’s Petition for a New Trial because of the errors hereinabove referred to and set forth, and also because (a) the evidence showed and the jury found that plaintiff was without the scope

of his employment at the time he was injured, and that the defendant failed in no duty which it owed him while he was so acting without the scope of his employment. (b) The evidence showed and the jury found that plaintiff's violation of his orders was the proximate cause of his injury. (c) The evidence showed that at the time of his injury plaintiff was acting in violation of the rules and orders of defendant, was in the commission of an unlawful act, and was without the scope of his employment. (d) The evidence showed no defect or insufficiency in any particular in the brakes on plaintiff's train due to the defendant's negligence. (e) Conceding that the evidence showed some defect or insufficiency in the brakes on plaintiff's train, notwithstanding, the evidence showed that such defect or insufficiency was not the proximate cause of plaintiff's injury. (f) The verdict returned by the jury in plaintiff's favor was inconsistent with and contrary to the special findings made by the jury in response to the interrogatories submitted by the Court.

Tenth: The Court erred in rendering judgment against the defendant.

WHEREFORE, defendant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore entered in plaintiff's favor, and enter judgment in defendant's favor, dismissing the action, or if it

be deemed that such relief is not grantable, that the cause be remanded for a new trial.

(Signed) GRAVES, KIZER & GRAVES.

Attorneys for Defendant.

Endorsements: Service of the within Assignments of Error is hereby acknowledged this 18th day of December, 1913.

(Signed) BELDEN & LOSEY,

Attorneys for Plaintiff.

Assignments of Error.

Filed in the U. S. District Court for the Eastern District of Washington, December 17, 1913.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL, *Plaintiff,*
vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, *Defendant.*

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above named defendant Spokane & Inland Empire Railroad Company, by its attorneys, and complains that in the record and proceedings had in this cause and in the order of the Court denying defendant's motion for judgment in its favor, and in entering judgment in

plaintiff's favor, and in all the matters and things complained of in the Assignments of Error filed herein in aid of this petition for a writ of error, manifest error appears, to the wrong and injury of this defendant. Your petitioner presents herewith Assignments of error wherein are set forth the errors alleged to have been committed by the District Court in the trial of this cause, and of which it will complain in the prosecution of a writ of error.

WHEREFORE, defendant prays for the allowance of a Writ of Error to the said District Court and for an order fixing the amount of the bond to be given thereon, and for such other orders and processes as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 17th day of December, 1913.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within Petition for a Writ of Error is hereby acknowledged this 18th day of December, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Petition for Writ of Error.

Filed in the U. S. District Court for the Eastern District of Washington, this 17th day of December, 1913.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

The defendant Spokane & Inland Empire Railroad Company, having this day filed its petition for a writ of error from the judgment heretofore entered herein against it to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors specifying the matters of which complaint is made and of which it will complain, all within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error.

NOW, THEREFORE, it is ordered that a Writ of Error be and hereby is allowed for the purpose of review in the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the judgment heretofore entered herein, and of all proceedings in said cause, and that the amount of bond on said Writ of Error be and hereby is fixed at Ten Thousand Dollars, which

bond when approved by the Court shall operate as a supersedeas and stay all proceedings herein.

Dated this 17th day of December, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Service of the within order is hereby acknowledged this 18th day of December, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Order Allowing Writ of Error.

Filed in the U. S. District Court for the Eastern District of Washington, December 17, 1913.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,
vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

WRIT OF ERROR.

(Lodged Copy.)

UNITED STATES OF AMERICA. ss.

The President of the United States to the Honorable, the Judge of the District Court of the United

States for the Eastern District of Washington, Northern Division, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Spokane & Inland Empire Railroad Company, Plaintiff in Error, and Edgar E. Campbell, Defendant in Error, manifest errors have happened to the great wrong and injury of the Spokane & Inland Empire Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal and distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 17th day of January next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the United States, the

18th day of December, in the year of our Lord
One Thousand Nine Hundred and Thirteen.

(Signed) W. H. HARE,
Clerk of the District Court of the United
(Seal.) States for the Eastern District of Wash-
ington, Northern Division.

The foregoing writ is hereby approved, this 18th
day of December, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Service of the within Writ of
Error is hereby acknowledged this 18th day of
December, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Writ of Error (Lodged Copy).

Filed in the U. S. District Court for the Eastern
District of Washington, December 18, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Spokane & Inland Empire Railroad Company, as principal, and American Surety Company of New York, a corporation duly authorized under the laws of the State of Washington and of the United States to become surety on bonds in such cases, as surety, are held and firmly bound unto Edgar E. Campbell in the sum of Ten Thousand (\$10,000) Dollars, to be paid to him, and for the payment of which sum well and truly to be made we bind ourselves, and each of us, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and dated this 18th day of December, 1913.

The condition of the foregoing bond is such that

WHEREAS in the District Court of the United States in and for the Eastern District of Washington, Northern Division, in an action pending in said Court between Edgar E. Campbell, as plaintiff, and the Spokane & Inland Empire Railroad Company, as defendant, a judgment was entered in favor of plaintiff and against said defendant awarding plaintiff a recovery of Seven Thousand Five Hundred (\$7,500) Dollars, and his costs, and

WHEREAS, the above named defendant has obtained from said Court a Writ of Error to review said judgment, and a citation directed to the above named plaintiff citing and admonishing

him to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, for the purpose of having said judgment reviewed and error alleged to have occurred therein to be corrected.

NOW, THEREFORE, the condition of this obligation is such that if the said Spokane & Inland Empire Railroad Company shall prosecute its said writ to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

Dated this 18th day of December, 1913.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

By GRAVES, KIZER & GRAVES,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW
YORK,

Attest:

By FRANK C. PAINE,
Resident Vice-President.

B. H. KIZER,
Resident Secretary.

The foregoing bond approved this 18th day of
December, 1913.

FRANK H. RUDKIN,
Judge.

Endorsements: Service of the within Bond is

hereby acknowledged this 18th day of December, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Bond on Writ of Error.

Filed in the U. S. District Court for the Eastern District of Washington, December 18, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

CITATION.

(Lodged Copy.)

UNITED STATES OF AMERICA. ss.

The President of the United States of America, to Edgar E. Campbell, plaintiff, and to Belden & Losey, your attorneys. Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office

of the District Court of the United States, for the Eastern District of Washington, Northern Division, wherein Spokane & Inland Empire Railroad Company is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment and other proceedings had in said cause in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of December, 1913, and of the independence of the United States, the 137th.

Attest:

(Signed) FRANK H. RUDKIN,

(Seal.) United States District Judge.

(Signed) W. H. HARE,

Clerk.

Endorsements: Service of the within Citation is hereby acknowledged this 18th day of December, 1913.

(Signed) BELDEN & LOSEY,

Attorneys for Plaintiff.

Citation (Lodged Copy).

Filed in the U. S. District Court for the Eastern District of Washington, December 18, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

EDGAR E. CAMPBELL,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States, for the Eastern District of Washington, Northern Division:

You will please prepare transcript of the complete record in the above entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under a writ of error to be perfected to said Court, and include in said transcript the full proceedings, pleadings, papers, records, and files, to-wit:

Third Amended Complaint.

Answer to Third Amended Complaint

Reply.

Verdict.

Special Findings Made by the Jury.

Defendant's Motion for Judgment Notwithstanding the Verdict.

Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict.

Opinion Denying Defendant's Motion for Judgment Notwithstanding the Verdict.

Defendant's Petition for a New Trial.

Opinion Denying Defendant's Petition for a New Trial.

Order Denying Defendant's Petition for a New Trial.

Judgment.

Stipulation Extending Time to File a Bill of Exceptions.

Bill of Exceptions.

Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Writ of Error.

Citation.

Copy of Bond on Writ of Error.

Praeceptum.

Also any and all other record entries, pleadings, proceedings, papers and files necessary or proper to make a complete record upon said Writ of Error in said cause, transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Service of the within Praeceptum

is hereby acknowledged this 18th day of December, 1913.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

Praecipe for Transcript of Record.

Filed in the U. S. District Court for the Eastern District of Washington, December 18, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1271.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF THE RECORD.

EDGAR E. CAMPBELL,

Plaintiff.

vs.

SPOKANE & INLAND EMPIRE RAILROAD
COMPANY, a Corporation,

Defendant.

UNITED STATES OF AMERICA, }
Eastern District of Washington. } ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing pages numbered from No. 1 to No. 158, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the

defendant and plaintiff in error in its praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the Writ of Error lodged and filed in my office on the 18th day of December, 1913.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$160.90 and that the said sum has been paid to me by Messrs. Graves, Kizer & Graves, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane, in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 29th day of December, 1913, and the Independence of the United States of America, the One Hundred and Thirty-eighth.

(Signed) W. H. HARE,
Clerk, U. S. District Court for the Eastern District of Washington.

(Seal.)

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE & INLAND EMPIRE
RAILROAD COMPANY, a Corpor-
ation, Plaintiff in Error,

vs.

EDGAR E. CAMPBELL,
Defendant in Error.

Error to the District Court of the United States for
the Eastern District of Washington

BRIEF FOR PLAINTIFF IN ERROR

Note.—Deeming it more convenient for court and counsel alike, the parties hereto will be referred to throughout this brief by their trial court designations; the defendant in error as plaintiff and the plaintiff in error as defendant.

STATEMENT OF THE CASE.

The defendant owns and operates an electric railway line extending from the city of Spokane, Washington, to the town of Coeur d'Alene, Idaho. In the latter part of the month of July, 1909, a land registration was in progress at Coeur d'Alene, the Government receiving there registrations for drawings for the allotment of an Indian Reservation near Coeur d'Alene. This drew an immense throng of people from all over the United States, who came in the first instance to Spokane and then went to Coeur d'Alene, the greater number of them over defendant's road, to register. In consequence of this rush the defendant was required to put in operation a number of special trains. On the afternoon of July 31, 1909, one of its special trains left Coeur d'Alene for Spokane and ran about a mile and a half when it collided with one of its regular trains which was approaching Coeur d'Alene from Spokane. Eighteen persons were killed in the wreck and a great number were injured. Plaintiff, who was the motorman on the wrecked train, was among the injured, and brought this action to recover damages for the injuries sustained by him. For cause of action he alleged that the defendant was a carrier of interstate commerce between Spokane, Washington, and Coeur d'Alene,

Idaho, and that while acting as motorman on one of its special trains running from Coeur d'Alene to Spokane, improper running orders were given him directing him to take his train and run from Coeur d'Alene to Spokane, meeting and passing regular train No. 20 at the station of Alan; that when nearing the station of Gibbs, a point between Coeur d'Alene and Alan, he came in collision with regular train No. 20; that after he saw No. 20 he could have brought his train to a stop but for the defective condition of the air brakes, whereby they failed to act, and that the collision was caused by the improper running orders and the furnishing him a train with defective air brakes. The defendant answered admitting that it was an interstate carrier and that on July 31, 1909, plaintiff was in its employ as motorman, and that the train he was running came in collision with No. 20, but denied the giving of improper orders and the failure to furnish proper air brakes. It affirmatively pleaded that the regular trains on its road were operated according to a time table and the rules and regulations of the company, and that special trains were run over its road in accordance with such rules and regulations and under telegraphic orders given by train dispatchers to the train operators; that at the time of the colli-

sion plaintiff was acting as motorman of a special train referred to and described in defendant's orders as Motor 5; that under the rules and regulations of the company such special train had no rights against the regular trains operating under a time table, and was obliged to keep out of the way of such regular trains, and that plaintiff had no right to go out on the road when a regular train was due unless telegraphic orders were given by the dispatcher to do so; that on the day of the collision plaintiff was in charge as motorman of the special train referred to as Motor 5 and was ready to start upon a run to Spokane as soon as one of defendant's regular trains, referred to in its time tables and orders as No. 20, should arrive; that No. 20 was due and the special train had no right to leave Coeur d'Alene until No. 20 arrived unless it had telegraphic orders to do so from the dispatcher in Spokane; that plaintiff received orders from the dispatcher to meet another special train at Alan, and was directed to run down to the further end of the Coeur d'Alene yards and wait there until No. 20 should arrive; that plaintiff started his train, but instead of stopping in the yards went out on the main line and came in collision with No. 20; that in the wreck eighteen persons were killed and a great number injured, and

in settlement of the damage claims defendant had been compelled to pay out \$345,000; that the wreck was caused solely and entirely by plaintiff's disobedience to his orders and inattention to his surroundings. To this affirmative matter the plaintiff replied, in substance denying that the orders he received before leaving Coeur d'Alene were to meet a special train at Alan, and reaffirming that the orders he received were to meet No. 20 there.

The cause was tried to a jury, the trial judge submitting to the jury the two issues upon which plaintiff based his right to recover, *viz.*, the giving of improper orders and the failure to equip plaintiff's train with sufficient air brakes. He also submitted three interrogatories to the jury, requiring them to find specially thereupon. The jury returned a general verdict in plaintiff's favor for \$7500.00 damages and answered the interrogatories as follows:

“Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?”

Answer: “Yes.”

“Did the plaintiff, Campbell, receive, before leaving Coeur d'Alene, train order No. 53 reading as follows: ‘Train order No. 53, from Spokane, 7-31-1909. To motor 5 at C. D. Alene station. Motor 5 will run Spl. C. D.

Alene to Spokane, meet special 4 east at Alan.' "

Answer: "Yes."

"If you find that the plaintiff left Coeur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident?"

Answer: "Yes."

The defendant moved for judgment *non obstante verdicto* on the special findings. Its motion was denied and it thereupon prayed a new trial. This too was denied, and judgment was entered upon the verdict, from which defendant has sued out a writ of error.

The questions which will be presented upon the writ are: That there was error in denying defendant's motion for judgment *non obstante* because it was established by the special findings of the jury (1) that plaintiff was not acting within the scope of his employment when he was injured, and defendant owed him no duty beyond that which it would owe to any other person on its tracks; (2) that the proximate cause of plaintiff's injury was his disobedience of orders and, consequently, his own wrong, and (3), that the cars which plaintiff was operating at the time of the injury were not required to be equipped with air

brakes by the Safety Appliance Act, and defendant's duty with respect to its equipment with brakes was to exercise ordinary care, which it did. Error in denying a new trial will be based upon the grounds heretofore indicated and upon the further ground that there was error in submitting the question of whether the air brakes on defendant's cars were defective because there was no evidence of any defect in the brakes which was due to defendant's negligence; because the evidence shows that defendant owed plaintiff only ordinary care in the equipment of the train with air brakes, and its duty in that behalf was discharged.

SPECIFICATION OF ERRORS RELIED UPON.

There was error:

First. In denying defendant's motion for judgment upon the special findings of the jury, notwithstanding the general verdict in plaintiff's favor.

Second. In charging the jury as follows:

“If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the col-

lision and that the defective condition of the air brakes was a direct and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

Third. In submitting to the jury the question of whether the air brakes on plaintiff's train were defective or insufficient.

Fourth. In charging the jury as follows, directly after stating to them that the question for their consideration was whether plaintiff took his train out in violation of his written orders, *viz.*:

"The next question for your consideration will be this: 'Were the air brakes on this motor and train defective?' If you find from a preponderance of the testimony that they were, the next question is: 'Was such defect the direct and proximate cause of the injury to the plaintiff?' If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff and it only remains to assess the amount of his recovery."

Fifth. In refusing to give the following charge, requested by defendant:

"I charge you that if the plaintiff left Coeur d'Alene in violation of the orders which he had, recklessly or willfully, or with such gross negligence as would amount to recklessness or willfulness, that then and in that event, the fact that the brakes did not work, if you find

they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely on the brakes and in that event your verdict should be for the defendant."

Sixth. In refusing to charge as requested by defendant as follows:

"If you find from the evidence that the plaintiff left Coeur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant."

Seventh. In refusing to charge as requested by the defendant, as follows:

"If you find that before leaving Coeur d'Alene plaintiff received train order No. 53 reading as follows: 'Train Order No. 53. From Spokane, 7-31-1909. To Motor 5 at C. D. Alene Station. Motor 5 will run Spl. C. D. Alene to Spokane, meet Special 4 East at Alan,' and left Coeur d'Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant."

Eighth. In entering judgment in plaintiff's favor.

ARGUMENT.

I.

Error in Denying Defendant's Motion for Judgment on the Jury's Special Findings.

The statutes of Washington relating to special findings by a jury and the effect of the inconsistency of such findings with a general verdict provide as follows:

“In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes. * * * When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.”

Rem. & Bal. Ann. Code, §§364-365.

Under these sections, the Supreme Court of the state has held that it may examine the evidence for the purpose of determining whether it supports special findings or general verdict, and reject either or both if it finds it or them unsupported.

Muehlman vs. Railway Co., 58 Wash., 327.

Scarpelli vs. Water Power Co., 63 Wash., 18.

Also it will examine the evidence for the purpose of determining what issues were submitted, the materiality of the special findings made, whether there was indeed conflict between them and the general verdict, etc., etc.

Willey vs. Morrow, 1 W. T., 474. ,
Mitchell vs. Matheson, 23 Wash., 723.
Mercier vs. Ins. Co., 24 Wash., 147.
Hobert vs. Seattle, 32 Wash., 331.
Abby vs. Wood, 43 Wash., 379.
Crowley vs. Railway Co., 46 Wash., 85.
Perry vs. Centralia, 50 Wash., 670.
Boucher vs. Railway Co., 50 Wash., 627.
Sudden vs. Morse, 55 Wash., 372.
O'Brien vs. Casualty Co., 58 Wash., 477.
Evans vs. Railway Co., 58 Wash., 434.
Minor vs. Stevens, 65 Wash., 423.

The statement of the foreman of a jury, made in the presence of the jury before their dismissal, as to what was intended by their answers to special interrogatories submitted to them, may be considered in determining whether special findings are inconsistent with the general verdict.

Cameron vs. Lumber Co., 68 Wash., 539.

Under §§721 and 914 of the Revised Statutes, the above statutes and the practice authorized by

them, as construed by the Supreme Court of the state, will, as matter of course, be applied and enforced in the Federal courts save wherein there may be conflict with the Federal laws. The decision of the Supreme Court in *Slocum vs. Ins. Co.*, 228 U. S., 364, has made it clear that because of the Seventh Amendment Federal courts may not follow a statutorily or otherwise established state practice of granting judgment *non obstante veredicto* where, in order to do so, it is necessary to weigh the evidence or pass upon the facts in issue. But the Supreme Court has held that statutes like that of Washington are not in conflict with the Seventh Amendment, and will be applied and enforced in the Federal courts.

“Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact, and no one today doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by

jury. Beyond this, it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties. * * * So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute. Beyond this we cannot shut our eyes to the fact that in many states in the Union, in whose constitutions is found in the most emphatic language an assertion of the inviolability of trial by jury, are statutes similar to the one enacted by the territorial legislature of New Mexico; that those statutes have been uniformly recognized as valid, and that a large amount of the litigation in the courts is carried through in obedience to the provisions of such statutes. It would certainly startle the profession to be told that such statutes contravene a constitutional requirement of the inviolability of jury trials. Indeed, the very argument of counsel for plaintiff in error is an admission that up to a certain extent those statutes are undoubtedly valid. That argument is practically that when the specific findings are returned and found to be conflicting with the general verdict the court is authorized to grant a new trial, but can do no more. But why should the power of the court be thus limited? If the facts as specially found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as

thus found? It certainly does so when a special verdict is returned. When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon the single response from the jury. We are clearly of opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a Territory to provide that on a trial of a common law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.”

Walker vs. Railroad Co., 165 U. S., 593.

In the case at bar we shall not invite the court to trench in the slightest degree upon the province

of the jury. We shall only ask that it apply the law to the facts which the jury have found. We shall request the court, however, to examine the pleadings, the evidence, the trial judge's charge to the jury, and the special findings and general verdict, in order to ascertain the issues submitted to the jury and the relation of the special findings to such issues, for thus may the inconsistency of the special findings with the general verdict be made to most clearly appear. This will be seen when the discussion of the merits of this assignment is reached. The trial judge refused to consider the motion for judgment *non obstante veredicto* upon its merits for the reason that he believed he could not "look to or consider the testimony for any purpose," and that to determine whether there was conflict between the special findings and general verdict, he was limited to a consideration of "the pleadings and the special verdict"; citing in support of his conclusion the New Jersey case of *Seabright vs. Railway Co.*, 60 Atl., 64, which, in turn, rests upon a citation of Tidd's and Archbold's Practice. With his view so restricted, he saw no inconsistency.

To consider only the pleadings and special findings was plain error. The Seventh Amendment alone stands in the way of the adoption by the

Federal courts of the state practice with respect to granting judgments *non obstante veredicto* to the full extent to which it prevails in the state courts. The Seventh Amendment only inhibits the practice where it is necessary to its exercise that the judges decide the facts. Where the jury have found the facts, Federal judges will adopt the state practice in applying the law thereto. Now what may be looked to in order to determine the effect of facts specially found by a jury, and their relation to the general verdict, is purely a matter of local practice. In New Jersey they follow the practice of Archbold and Tidd (*vide* above decision) in holding that "in determining what judgment shall be entered upon a special verdict, nothing can be looked at by the court except the pleadings and the *postea*." It is a far cry from the practice of Tidd and Archbold to the reformed procedure embodied in the code of Washington, and a Federal judge sitting within that state is not privileged to reject its practice in favor of Tidd's, no matter how thoroughly he may be in accord with Uriah Heep's opinion of the beauties of that author. The Supreme Court of Washington has held, as the decisions above cited show, that under the Washington statutes with respect to special findings and the effect of

inconsistency between them and a general verdict it is competent to look to the entire record; pleadings, evidence, instructions, findings and all, in order to ascertain how fully the issues were covered by the findings, and whether, in view of the issues, there is conflict between the findings and the general verdict.

Thus in *Mercier vs. Insurance Co.* (24 Wash., 154) the Supreme Court said that for the purpose of harmonizing a general verdict and special findings it was the duty of the court to take "into consideration the entire record of the cause." In *Hobert vs. Seattle* (32 Wash., 332) the court in considering the effect of special findings claimed to be inconsistent with the general verdict, referred to the evidence which showed the plaintiff's knowledge of the defective condition of a street which was complained of as the cause of his injury. In *Abby vs. Wood* (43 Wash., 379) the court, holding that special findings were not inconsistent with a general verdict, said: "While at first blush the answers to the interrogatories might seem a little inconsistent with one another, yet in the light of the issues and evidence involved, we think they are consistent and find support in the evidence." In *Crowley vs. Railway Company* (46 Wash., 85) the plaintiff, a trespasser upon a rail-

way train, alleged that while he was standing on the side ladder of a box car a brakeman struck him, knocking him from the train while it was running at a high rate of speed and causing injury. The court said that "the plaintiff in his own behalf testified that the defendant Haight hit him upon the head with a lantern and knocked him off the car. He offered no evidence aside from his own and there is no other showing that he fell from the train by being struck or knocked off." A general verdict was returned in his favor and the jury also found that the brakeman did not by a blow from his lantern strike the plaintiff and knock him from the side of the car. On motion for judgment *non obstante veredicto* the plaintiff urged that his complaint was broad enough to sustain evidence of many tortious methods of throwing him from the train other than the one referred to in the special finding, and, therefore, that the court must presume in aid of the general verdict that there was in the record proof of some other method of tortious eviction from the train. The court looked to the evidence and held the contention unsound, saying:

"If the respondent was not knocked from the car by a blow of the lantern, then the proof herein is a complete blank. He has established no other fact which justifies a recov-

ery. He made no claim that he was struck, beaten, or assaulted in any other manner; yet his counsel now contend that the general verdict must stand as the pleadings were sufficiently broad to have permitted such evidence, or evidence that the brakeman kicked him off, struck him off with a club, or threw him off by main force. Respondent offered no such evidence, nor does he now dispute the appellants' contention that there was not one particle of proof authorizing a recovery, except his statements which the jury have rejected as unworthy of credit."

In *Sudden vs. Morse* (55 Wash., 372), in passing upon the effect of a special finding, the court said that "this special finding must be read in the light of all the testimony, the issues involved therein, and the evident understanding of the jury in making answer." In *Evans vs. Railway Company* (58 Wash., 434) it was said:

"The appellants insist that the answer is in conflict with the instructions of the court, and that their motion for a judgment notwithstanding the verdict should have been granted. The contention is untenable, for three reasons: (1) If the parties made an oral contract, the sufficiency of the consideration was a legal question for the determination of the court, and not a fact for the consideration of the jury; (2) the answer to the interrogatory necessarily implied that the minds of the parties met and that the oral contract was made, thus falling within the instruction that 'one promise is a good consideration for another,' and (3) the consideration found was a sufficient consideration and within the evidence."

In *Cameron vs. Lumber Company* (68 Wash., 543) it was said:

“It is insisted that these special findings are, in effect, that Gibbs and Stack did not contract with respondent individually in their own behalf, in any sense. Reading the special finding and answers thereto standing alone, and without reference to the explanation given by the foreman of the jury to the court in the presence of the jury, upon counsel for respondent calling attention to the possible inconsistency between the general verdict and special findings, the contention of counsel for appellants would seem to be well founded. But in the light of the foreman’s remarks to the court as to the intentions of the jury in rendering the general verdict and answering the special interrogatories, it seems that the jury intended to find that neither Gibbs nor Stack intended to contract solely with respondent, without also at the same time contracting for the company.”

In the case at bar the sharply drawn issues presented by the plaintiff’s complaint and met by the defendant’s answer were that plaintiff received orders to leave Coeur d’Alene with his train and meet No. 20 at the station of Alan; that before he reached Alan he came in collision with No. 20, and that he might have avoided the collision, notwithstanding the wrong on defendant’s part in putting him in a dangerous position by reason of its improper orders, but that his brakes were defective and failed to work. The jury found that

the brakes on plaintiff's train were insufficient to control its speed immediately before the collision, that the order which plaintiff received at Coeur d'Alene was to meet Special 4 East at Alan, and that his leaving Coeur d'Alene in violation of his orders was the proximate cause of his injury. It is probable that these findings are sufficiently clear to negate plaintiff's allegations that he had orders against No. 20, that is, to meet it at Alan, and therefore was rightfully on the road when he collided with it, and that the brakes failed to protect him, being rightfully where he was, against the wrong of the defendant in putting him there by an improper order. If it shall be said, however, that the findings do not clearly and positively negate these claims of the plaintiff, then we insist that the court may determine the scope and meaning of the findings by ascertaining the nature of the issues involved and what was necessarily determined by the findings through reference to the evidence and the court's instructions. Such reference is not for the purpose of usurping the jury's functions and passing upon any fact involved, but merely for the purpose of clarifying that which might be deemed to be obscure without such reference. To so refer is not to offend against the Seventh Amendment by passing upon facts which

are for the jury to decide, but only to follow the state practice of ascertaining the jury's intent and the full scope and effect of the special findings by reference to the entire record in the case. Sections 721 and 914 of the Revised Statutes require the court to conform to the state practice in that behalf, Tidd notwithstanding.

And now to the merits of the assignment under discussion.

In his complaint the plaintiff pleaded two items of actionable negligence. The first was that improper running orders were given him, in that he was directed to take his train and run from Coeur d'Alene to Spokane, meeting and passing No. 20, a Coeur d'Alene bound train, at the station of Alan, and that before he reached Alan he met and collided with No. 20. The second was that, being rightfully on the road, in compliance with the orders above referred to, he saw No. 20 in time to have brought his train to a stop and avoided the collision but for the defective condition of the air brakes on his train. The answer joined issue on both charges of negligence; denying that he had orders to meet No. 20 at Alan, and pleading affirmatively that the orders he received were to meet a special train at Alan, that he had no orders against No. 20, that he had no right to leave Coeur

d'Alene until No. 20 arrived unless he had such orders, and that the collision of his train with No. 20 was caused by his leaving Coeur d'Alene in violation of his orders and the defendant's rules. As to the second specified item of negligence, it was denied that the brakes were defective, and it was affirmatively pleaded that because of the plaintiff's inattention he did not see No. 20 until so close upon it he could not avoid the collision. To sustain the issues tendered by him, plaintiff testified that at Coeur d'Alene he received written orders, sent by the dispatcher at Spokane in accordance with the defendant's rules, directing him to run special Coeur d'Alene to Spokane, meeting No. 20 at Alan. He distinctly admitted, without equivocation, that his train, being a special, was of inferior class to No. 20, which was a regular train and ran by time card, and that unless he had special orders from the dispatcher with respect to meeting No. 20, it was his duty to look out for it and keep out of its way, clearing its time by at least five minutes. He based his right to be where he was at the time of the collision solely and entirely upon his claim that the orders he received at Couer d'Alene were to met No. 20 at Alan. If he received no orders against No. 20, he admitted that he should have stayed in Coeur

d'Alene until it arrived.

It was proven beyond peradventure that plaintiff received no orders against No. 20. His conductor testified he did not; the dispatcher testified he did not; the conductor and motorman of No. 20, who, if he had orders against that train would have received similar orders against his train, testified he did not; the train order book kept in the dispatcher's office shows he did not. Indeed, at the time he claims to have received the order No. 20 was already past Alan and was approaching Coeur d'Alene. The order he did receive was to meet special 4 east at Alan. So testified his conductor, the dispatcher, the conductor and motorman of special 4 east, who were required to and did receive the same order, and so show the train order book and the orders themselves; these latter, including plaintiff's copy which was picked up at the scene of the wreck after the collision, being put in evidence. So overwhelming was the evidence against plaintiff's unsupported testimony that the jury could not and did not give the slightest credence to it.

With respect to the brakes, plaintiff testified that his train was equipped with air brakes of a standard make; that the train, consisting of the motor car and two trailers, was made up when

he took it at Spokane in the morning of the day of the wreck and was not changed in its makeup during the day; that he tested the brakes at Spokane that morning, as was his duty, and found them working all right; that they worked all right during the whole day; that they worked all right when he came into Coeur d'Alene on the trip before the wreck, when he turned his train on the wye in the shops, and when he brought it out to start on the return trip to Spokane; that when he saw No. 20 he "dynamited" the train, by which he meant, he said, that he threw the brakes into the emergency, giving it all the air he had; that when he did so the brakes took hold all right "and was making a stop very nicely," when for some reason they released, leaving him without means of stopping the train; that had they been working properly, they would not have released; that, while he could think of several things which might have caused them to release, such as dirt or water getting in some valve, the breaking of air pipes or brake beams under the strain of the emergency or of an improper application, or some other possible cause he could not think of on the spur of the moment, yet "I don't know what did happen, and I don't think anybody else does either." The which, unfortunately for defendant, is quite true,

as the motor car was completely demolished in the wreck.

Now there was not in all of plaintiff's case, either in the pleadings or the evidence, any other than the two causes suggested for the collision: the wrongful order to meet No. 20 at Alan, and the defective brakes. And so the instructions to the jury confined their consideration to those two issues. To quote:

“At the outset I charge you as a matter of law that the collision between these two trains was the result of gross and almost criminal negligence on the part of some officer or agent of the defendant company, and if you find from a preponderance of the testimony, that is, from the greater weight of the testimony, that the written orders delivered to the plaintiff directed him to take his train out of Coeur d'Alene city and to meet regular train No. 20 at Alan, such negligence was not the negligence of the plaintiff, but of some other officer or agent of the company, for whose acts the company is responsible, and your verdict will be for the plaintiff in such sum as you deem him entitled to without considering any other question in the case. If, on the other hand, the plaintiff's orders were those offered in evidence by the defendant and directed the plaintiff to meet Special Number 4 East at Alan and not Regular Number 20 at that point, the negligence causing the collision was the negligence of the plaintiff and will bar a recovery as to the charge of negligence based on the delivery of improper orders. And if you find from the testimony that the plaintiff

disobeyed the written orders delivered to him, and that such disobedience of orders was the direct and proximate cause of the injury to the plaintiff, your verdict will be for the defendant. If, on the other hand, you find from a preponderance of the testimony that the air brakes on the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was the direct and proximate cause of the collision, or contributed directly and proximately to the collision, and to the injury to the plaintiff, your verdict will be for the plaintiff."

And again:

"To place the issues before you in this case in concrete form, Gentlemen: The questions presented for your consideration are rather simple. One is, did the plaintiff take his train out of Coeur d'Alene city on that night in violation of the written orders given him by the conductor? If he did, he was guilty of negligence, and if that negligence was the direct and proximate cause of his injury he has no right of action here. The next question for your consideration will be this: Were the air brakes on this motor and train defective? If you find from a preponderance of the testimony that they were, the next question is, was such defect the direct and proximate cause of the injury to the plaintiff? If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff, and it only remains to assess the amount of his recovery. The principal and vital question in the case is one of proximate cause, aside from the two issues, as to whether or not the orders

were disobeyed and whether or not the air brakes were defective. You may now retire."

Interrogatories were submitted and answered as follows:

"Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?"

Answer: Yes."

"Did the plaintiff, Campbell, receive, before leaving Coeur d'Alene, train order No. 53, reading as follows: 'Train order No. 53, from Spokane, 7-31-1909. To motor 5 at C. D. Alene Station. Motor 5 will run spl. C. D. Alene to Spokane, meet special 4 east at Alan.'"

Answer: Yes."

"If you find that the plaintiff left Coeur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident?"

Answer: Yes."

In view of the answers to the second and third interrogatories, the general verdict must fall unless it may be sustained by the answer to the first interrogatory. It may not, we think, be so sustained for three reasons:

(a) The three findings, considered in the light of the pleadings, evidence and instructions, show that when plaintiff was injured he was acting with-

out the scope of his employment, and while so acting defendant owed him no greater duty than it did any trespasser or licensee upon its tracks, which duty it more than discharged.

(b) Such findings, so considered, show plaintiff's injury to have been proximately caused by his violation of the law and of defendant's rules and orders, and he can base no claim of right upon his own wrong.

(c) No absolute duty rested upon defendant to furnish plaintiff a train equipped with air brakes, but at the utmost it was required only to exercise ordinary care in that behalf, the which it appears to have done.

We will develop these reasons in order.

(a) The relation of master and servant is contractual. When it is created, reciprocal rights, duties and obligations at once arise. Speaking to the principles to be considered, the master undertakes (in more or less absolute form, as the policy of the state may prescribe) that he will furnish the servant a safe place in which and safe appliances with which to discharge the duties the master requires of him. On his part the servant undertakes that he will discharge the duties required of him, and that in their discharge he will violate

no law to his master's prejudice, and will obey such reasonable orders as may be given, and conform to such reasonable rules as may be prescribed, by the master for the discharge of his duties. The obligation of the servant in these behalfs is as imperative as that of the master. It is no more permitted him to breach his contract than it is to the master to breach his. No citation of authority, of course, is permissible to so fundamental a principle.

In the hazardous occupation of operating a railroad, it is more essential than in any other that the master prescribe rules for the conduct of the work, and give such orders as may be necessary in order that it may be safely done, and in corresponding degree it is essential that the servant unhesitatingly and undeviatingly obey the orders given him and comply with the rules prescribed for his conduct. Any disobedience, any deviation, endangers not only the life and limb of the offending servant, but the lives and limbs of his fellow servants and the traveling public as well. The jury have specially found that plaintiff left Coeur d'Alene without orders against No. 20, and that his doing so was the proximate cause of the collision with that train. Plaintiff admitted that if he left Coeur d'Alene without orders against No. 20, he violated the rules and orders made by de-

fendant to secure the safety of himself, his fellow servants, and the passengers upon his train. The jury have found that he did leave without such orders, and so have convicted him of wanton violation of the duty he owed his master; of the obligation he had undertaken to it.

The finding convicted him of more. The violation of his duty and the resultant wreck occurred in Idaho. A statute of Idaho reads as follows:

“Every engineer, conductor, brakeman, switchtender, or other officer, agent, or servant of any railroad company, who is guilty of any willful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.”

2 Idaho Revised Codes, §6926.

Another reads thus:

“Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad car, locomotive, or train, who wilfully or negligently suffers or causes the same to collide with another car, locomotive or train, or with any other object or thing whereby the death of a human being is produced, is punishable by imprisonment in the State Prison for not less than one nor more than ten years.”

Ibid. §6909.

Plaintiff violated both. He endangered the lives and safety of many persons when he left Coeur d'Alene in reckless, wanton, wilful violation of his employer's rules and orders, and hurled his train along the single track toward the on-coming regular train, the operators of which, secure in their observance of their employer's orders, had no thought of peril before them. Only fortuity could then have prevented the disaster, and that, unhappily, did not intervene, and plaintiff consummated the crime when he crashed into No. 20, doing to death eighteen persons in the crowded cars behind him, and injuring and maiming half a hundred or more besides.

Under the second and third findings, the first became utterly immaterial. It is only that the air brakes on plaintiff's train were insufficient to enable him to control the speed of the train immediately before the collision. There is no finding that defendant was negligent in that it improperly equipped the train; no finding that under normal conditions the brakes would not have worked properly. Under the evidence no such finding could have been made, for from plaintiff's own evidence it appears the brakes were of standard make; that apparently there was nothing wrong with them; that during the day, up until almost the instant of

the collision, they had worked perfectly, and that the only evidence of insufficiency was that in the exigency of an impending collision, where but two or three seconds elapsed from the warning of danger to the catastrophe, they failed to hold under the stress of "dynamiting." Plaintiff does not claim to know of any deficiency in them, and says he does not think any one else knows of any. But among his surmisings as to what might have caused them to release he says:

"I don't know whether the brakes broke in two when I applied them or not, they could do it. If there was an air connection brake in the train line, they might break from putting them on too hard. Possibly it would break the brake-beam, or something like that. It would not release the air unless you broke the cylinder; that would release it. If you did not apply your emergency properly that might have happened."

The findings, then, show that plaintiff was in a place where he had no right to be, in violation of law and the orders of his employer, and that because of this act he was placed in great and imminent danger. Under such circumstances his employer owed him no greater duty than it would owe any trespasser upon its property, and certainly to no trespasser would it owe the duty to furnish appliances which would not give way under any strain, no matter how extraordinary, which he

might put upon them in an endeavor to extricate himself from a danger to which his own unlawful act had exposed him.

That a party to a contract who is damaged because of engaging in a transaction not contemplated in nor required by the contract; one, in other words, who is acting quite without the scope of the contract, cannot compel the other contracting party to make good such damage, is the statement of a self-evident principle of law. The same principle enters into the contractual relation of master and servant, and is often decisive of the question of the master's liability for injuries sustained by his servant. In that relation the question is said to be, whether the injured person was at the time of his injury acting in the capacity of a servant; whether he was doing that which his contract of employment required of him, or whether he was acting in a manner so foreign, or, mayhap, so opposed to that which his contract required, that he should be deemed for the nonce to have stepped aside from the obligations enjoined upon him by the contract, and during that time to have lost the right to demand from the master the performance of the duties enjoined upon him by the contract. Mr. Labatt, writing under the head "Scope of Employment," says:

“The extent of the defendant’s liability often turns upon the answer to the question whether the injured person was acting, at the time when his injury was received, in the capacity of a servant, and was therefore entitled to the rights and subject to the disabilities which the law infers when the existence of a contract of employment is established. Unless this question is answered in the affirmative, it is manifest that, on the one hand, he cannot hold his master liable for the non-performance of the various obligations which are treated as implied incidents of the contract, and that, on the other hand, the defense of assumption of risks, at all events in so far as it rests upon the theory of a hypothetical agreement, is not available to the master.

* * * An analysis of the cases which deal with the question whether the injured person was a servant acting in the course of his employment shows that, broadly speaking, they may be divided into two classes. In one of these the controlling issue presented for determination is simply whether the relation of master and servant was or was not suspended or intermitted at the time when the injury was received. In the other the essential consideration upon which the right of action hinges is that the injured person was, or was not authorized to be in that particular position which he was occupying at the time of the accident, or to engage in that particular work which he was then doing.”

4 *Labatt, Master and Servant* (2d. Ed) §1554.

As put by Mr. Thompson under the head of “When Relation of Master and Servant Exists”:

“If the servant voluntarily, and without any

necessity growing out of his work, abandons the employment for which he is engaged and steps entirely outside the line of his duty, he thereby suspends the relation of master and servant as between his master and himself, and voluntarily puts himself in the attitude of a stranger—in which case the question of the liability of the master to him for a negligent injury will be tested by the principle which would govern as between the master and a stranger.”

4 *Thompson on Negligence*, (2d Ed.) §3749.

A more specific statement of the rule is found in *Bunida vs. Armour & Company*, 150 Ill. App. 302, where it was said:

“It is the duty of the employer to use reasonable care to furnish his employe a reasonably safe place to perform the work he is directed by the employer, either expressly or impliedly, to perform. The work of the employer is to be under his own control, and it is for him, or his representative, to give such orders and directions as he may deem proper in respect to the work to be performed by his employe and the place in which such work shall be done. If an employer, either expressly or impliedly, directs an employe to perform work in a particular place, the law raises the duty on the part of the employer to use reasonable care to have and keep such place in a reasonably safe condition for the performance of such work, and a breach of such duty constitutes and is negligence. But it is not sufficient to constitute negligence on the part of the employer, that an employe, of his own volition, engages in work he has not been directed by his employer, either expressly

or impliedly, to perform, in a place where he has not been directed, either expressly or impliedly, to go, although such place be unsafe and dangerous. The duty of the employer to the employe to have and keep a place reasonably safe does not exist unless the employer or his representative knows, or has reason to believe, that the employe is serving his employer in such place."

Turning from the general to the specific we cite *Railway Company vs. Chapman*, 62 S. E. 488. There the plaintiff, suing in the courts of the State of Georgia, set up and relied upon a statute of North Carolina giving a right of action to an injured employe of a railway company in terms similar to the Federal Employer's Liability Act, and pleaded that being an engineer in defendant's employ in the State of North Carolina he went to take charge of an engine in the course of his employment and as his duty required, and when about to mount the engine it was suddenly moved, in violation of the rules of the company, whereby he was injured. The original answer denied negligence and pleaded that the injury was due to the plaintiff's own want of care.. At the trial defendant asked leave to amend its answer, pleading a statute of North Carolina making it a misdemeanor for any person to be in charge of a locomotive engine while intoxicated, and to allege that at the time plaintiff was injured he was intoxicated. The

amendment was not permitted. The cause was reversed because of the refusal to permit the amendment, and the reasoning of the court in the opinion reversing the cause is so clear and so applicable to the case here presented that we quote from it at length:

“It is our opinion, however, that the court erred in not allowing the defendant to plead and prove the North Carolina statute by which it is made a misdemeanor for any person to be in charge of a locomotive engine while intoxicated. Its relevancy to the case inheres in the question as to the defendant’s negligence, rather than in the question as to the plaintiff’s contributory negligence. The principal negligent act upon which the plaintiff relies for a recovery is that an engineer of the defendant company put the engine in motion without causing the bell to be rung. To show that he was one of the persons to whom this duty of ringing the bell was due, the plaintiff alleged that at the time of the injury he was an employe, conducting himself within the line of his duty. Some such allegation was necessary on his part; for although the rule required the ringing of the bell, and although a failure to give this warning would, in a general and abstract way, be neglect, still, unless the plaintiff was one of those persons for whose benefit this duty was required, the omission would not be actionable negligence as to him. * * * It seems so sufficiently clear as to justify the simple statement, without elaboration, that if the plaintiff in this case were a trespasser, and without any invitation from the company attempted to mount the engine, and the engineer, without actual or construc-

tive knowledge of his presence, moved the engine and hurt him, he could not recover although the bell was not rung. By alleging that he was an employe in the line of his duty when he approached the engine and attempted to mount it, the plaintiff shows a right to be upon the premises, a right to be where he was, a right to claim the usual warning before the engine was moved. Now, the defendant was entitled to show anything which would negative the plaintiff's right to be where he was and would place him in the attitude of a trespasser; and it must be remembered that an employe, when not in line of or in the discharge of some duty of his employment, stands in the relation to the master and to the master's other servants just as any other member of the general public would. *Snowball vs. Seaboard Ry.* 130 G., 85, 60 S. E. 189; *S. F. & W. Ry. vs. Flannagan*, 82 Ga. 580, 9 S. E. 471, 14 Am. St. Rep. 183. Now, if the plaintiff was intoxicated at the time of his injury, and was trying to get upon the locomotive to take charge of it as engineer, he was not there in an effort to perform a duty, but to violate the law; for to take charge of an engine while intoxicated is a crime in North Carolina.

The law implies an invitation from the master to the servant to enter and remain upon and to move about in his premises, and to handle, use, and be in range of his tools, appliances, and machinery, so far as necessary to the performance of the servant's duty. Indeed, it is out of this implied invitation and the common-law principles regulating the duties of a landowner to invited persons upon his premises, that the courts have largely constructed that portion of our jurisprudence which relates to the duties of the master as to the servant's safety while he is engaged in the

the work. But *prima facie*, at least, it will not be presumed that a master whose occupation is lawful invites a servant to come upon his premises or to use his instrumentalities to violate the law. *Rollestine vs. Cassirer*, 3 Ga. App. 161, 59 S. E. 442 (1). If the plaintiff was intoxicated, the very moment he became so, every rule, usage, instruction, direction, or command of the master, given him while he was sober, by which he was authorized to enter upon the locomotive and to take charge of it, became immediately abrogated, and remained so until he became sober, or until the master, with knowledge of his drunkenness, gave him new authority. If he was intoxicated, and came upon the company's premises for the purpose of violating the law, he was no longer an employe in the line of his duty, but was a mere trespasser, or quasi trespasser, and entitled to no higher degree of care than any other person who might have attempted to climb upon the engine to violate any other criminal statute would have been. The necessary result of the court's action was to deprive the railway company of this line of defense."

In *Williamson vs. Berlin Mills Company*, 190 Federal, 1, there was evidence that an oiler in a mill was injured while about the mill where he had a right to be, but not while discharging any duty he owed to his employer; the evidence showing that at the time he was injured, or shortly before, he was standing near a shaft with a projecting set screw, engaged in idle conversation with some other operatives about the mill. It was urged that he could not have been outside of the line of his duty

while he was in and about the place where his duties were to be performed. Said the court:

“We cannot accept this theory as sound. Though in a place where his duty requires him to be, a servant may nevertheless so conduct himself as to be outside the scope of his employment, as, for example, if he undertakes, while there, work different from that which he is hired to do, without orders or permission from his employer. It may be admitted that actual performance of work at the given moment need not be shown, and that, had nothing else appeared, except that Williamson was “around the filters” subject to orders and ready for any work incumbent upon him at any time, there would have been nothing tending to show him outside the line of his duties. *Harvey vs. Texas, etc., Co.*, 166 Fed. 385, 398, 92, C. C. A. 237. We think, however, that what did further appear as to his position and occupation at the given moment forbade the instruction requested by the plaintiff and required the course taken by the learned presiding judge. The question is one for the jury in most cases. *Labatt, Master and Servant*, §634.”

In *Railway Company vs. Doty*, 133 Federal, 866, the injured employe, a hostler whose duty it was to be in the engine cab moving the engine when switching about the yards, got down from the cab, turned over the movement of the engine to an engine watchman whose duty it was to turn the switches, and himself undertook to discharge the duty of watchman in turning the switches. He

was injured while so engaged. The court held there could be no recovery. In so holding there is again so much said that is pertinent to this case that we cannot refrain from quoting from the opinion at length:

“It was shown, and, indeed, it was alleged in the petition, that the defendant employed the plaintiff as a hostler. He was not employed to do the work of an engine watchman, which belonged to another class of employes. It is a matter of common knowledge that the operation of railroads is a complex and dangerous business. For this reason, as has often been observed, a system of rules and regulations is indispensable to its proper and safe conduct—indispensable alike to successful management and safety of employes. The duty which is thereby devolved upon the employer is recognized and affirmed by former decisions of this court. *Railroad Company vs. Camp*, 65 Fed. 952, 13 C. C. A., 233, per Taft, J.; *Lake Erie and W. R. Co vs. Craig*, 80 Fed. 488, 495, 25 C. C. A. 585, where Judge Clark refers to other authorities. And it has been held that a railroad company which fails to provide proper and reasonably adequate regulations is guilty of actionable negligence. In 20 *Am. & Eng. Encyl. of Law*, 101 (2d Ed.), it is said:

“It is the duty of persons or corporations having many men in their employ, and carrying on a dangerous and complicated business, to make rules which if observed, will afford reasonable protection to the employes against the dangers incident to the performance of their respective duties. Failure to do so is negligence, and for injuries to an employe re-

sulting from such failure of duty the master is liable.'

"And numerous authorities, English and American, are cited in support of the statement.

"It is a necessary counterpart of this requirement that the company's employes shall observe and conform to such regulations. The obligations are mutual. And if the employe will not conform to them to the extent that he reasonably can, and suffers an injury not wantonly inflicted, he forfeits his claim to protection from his employer, and must himself bear the consequences. It is equally necessary in such business that the several duties of the service shall be distributed and assigned to different classes of employes according to their qualifications. Otherwise confusion in operation and danger from lack of special qualification for the particular service must ensue. In short, all those reasons which support the expediency and necessity of the requirement of rules and regulations apply with full force to the specification of duties, and the classification of employes who are to perform them. The wages paid vary according to the nature of the employment, whether of special skill and ability, or sometimes of special danger. The duty of the employer to provide a safe place for the workman is affected by the skill and experience in that line of work of those whom the employer associates with him. The obligation of the employer to provide a safe place for his employes is one which springs out of the contract of employment, and is personal to each. It derives its character and limitations from the principal contract, and the relations of the parties thereby assumed. The obligation to those of each class of em-

ployes is different from that to another, and often it is different toward the several persons in the same class. Moreover, the employer is entitled to have his work done by those to whom it is assigned. From their familiarity with it and the conditions in which it is performed, they would be more likely to know and guard against defects and dangers which are presented to them; and the employe is better qualified to do the work with safety to himself than one in another class would be. The case before us presents an apt illustration. The plaintiff testified that he did not know of the existence of the box until the moment of the accident. A switchman working in the yard could hardly have failed to have known it. All these considerations make it the duty of the employe to confine himself to the scope of his employment, unless there arise some emergency not contemplated. And hence the rule of law is that if the employe, without necessity, undertakes duties to which he is not assigned, and are without the scope of his employment, he does so at his own risk, and has not that protection from the negligence of the employer which one would have who is assigned to the discharge of that duty. The rule is correctly stated in 30 *Am. & Eng. Encycl. of Law*, 131, under the title "Master and Servant," as follows:

" 'When a servant voluntarily, and without the order of the master or vice principal, attempts the performance of hazardous work outside the scope of his employment, he cannot recover for injuries sustained while so doing.' "

In *Burnett vs. Mills Co.*, 67 S. E., 30, the plaintiff, a boy of 15, was injured while attempting to

do an act in a way which had been forbidden. It was held there could be no recovery, the court saying:

“So far as the law on this branch of the case is concerned, it is fully stated in *Pater-son vs. Lumber Company*, 145 N. C., 42, 58, S. E. 437, and the principle therein announced is specially applicable to the facts of this case. We said in *Pater-son’s Case* that: ‘Where the employe steps outside the line of his duty, or goes beyond the scope of his employment and does something he is not required to do, he cannot recover from his master for any consequent injury, for in that particular he is not his servant, and his contract does not provide for the new risk which he thus assumes and to which he exposes himself. The result is the same where the servant without the order or request of his employer or representative, or contrary to his orders, or at the request of another employe who has no authority from the master to make it, undertakes to do something not assigned to him. In such a case he assumes all the risk of injury. The master contracts to exercise ordinary care for the purpose of keeping his premises, his machinery, his tools, and his appliances in a reasonable condition of safety for the protection of his servant employed to perform a stated service, and who is entitled to that protection while engaged in his work and so long as he continues therein and confines himself to what he is employed to do. The duty of the master to furnish safe and suitable implements and appliances, which due care for the protection of his servant would suggest, extends only to those employes who are required, permitted, or expected, in the

course of the employment, to make use of the instrumentalities provided by him, or who, while in the performance of their work, may be injured by them if they are defective. Where the servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended. The servant's position is, then, analogous to that of a trespasser, or, perhaps, of a bare licensee, and his master owes him no duty, nor is he under any legal obligation to anticipate his deviation from his instructions and the possible danger which may arise to him therefrom, and consequently to provide means for averting it. The servant becomes a volunteer as to the particular act which is outside the scope of his service and which he attempts to perform. He must, therefore, take things as he finds them, and suffer the consequences of his own error. The master cannot be held liable therefor, as the law will not, on obvious grounds of justice, compel the master to answer in damages for any injury which the servant has brought on himself by undertaking to do that which he was not directed or required to do, and it refers his injury not to the fault of the master, but to his own unnecessary and gratuitous act. Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of transition, and his corresponding liability for a resulting injury disappears. There being no longer a contractual or legal relation imposing any duty on the master for a breach of which he would be liable, it follows that there is nothing upon which to rest any claim for damages, because no cause of action arises from a failure to perform a mere act

of humanity, or for the violation simply of a moral obligation not involving any legal duty. This principle is well established, if not elementary. It is grounded in wisdom and justice, it is perfectly fair to the master and to the servant, and moreover, it is supported by the highest authority.' ”

In *Railway Company vs. Barnes*, 117 S. W., 261, a train was standing on a siding waiting for other trains to pass. A man connected with the crew, while idling away the time with others in waiting for the train to move, unnecessarily took a position upon the track behind the tender of the engine. He was injured by the movement of the engine without warning, in violation of the rules of the company. The court held that no negligence was proven because the duty to give warning before the engine was moved was intended for the protection of such employes as might be in the discharge of their duty, and not for such as might be furthering their own pleasure when injured. Said the court:

“It is a duty imposed upon railroad companies to establish and publish rules for the operation of trains and the government and control of employes when in the discharge of their duty for the purpose of promoting the safety of the employes and to protect them from the negligence of each other; and the failure to establish, promulgate, and enforce rules which, if observed, will afford the employes reasonable protection against the dan-

gers of the employment and avoid exposing them to unnecessary risks, will render the company liable in damages for accidents and injuries occurring because of such failure. 1 *Sherman & Redfield on Negligence*, §202; *Elliott on Railroads*, §1280; *Thompson on Negligence*, §§4135-4173; *Nolan vs. New York, N. H. & H. R. R. Co.*, 70 Conn., 159, 39 Atl., 115, 43 L. R. A., 305, and extended note. And when an employe, who is himself free from negligence that would defeat a recovery, is injured or killed by a violation by a superior agent or officer of the company of the rules, an action to recover damages for the loss will lie. The reason of this is that the employes have the right to assume that their superiors will observe the rules set down for their guidance and government, and will not in violation of these rules, or without regard to them, do anything that will place other employes in peril. In the management and operation of trains the employes are called upon at all times of the day and night in the performance of their duties to place themselves in positions of great peril, where the slightest movement of the train without notice will endanger limb as well as life. But they go confidently into those hazardous places, relying upon the rules of the company to protect them, and feeling that the train will not be moved until some warning or notice has been sounded in accordance with the rules. It has therefore come to pass that absolute obedience to the rules established for the movement of trains is of the first importance. It is indispensable to the safety of life and protection of property that carriers engaged in the hazardous business of transportation by modern methods should devise and publish these rules, not only for the safety of the public, but for the protection of the em-

ployes. If it were not for the establishment and promulgation of these rules, and the fact that obedience to them is unconditionally exacted, and very generally accorded, employes engaged in the operation of trains would be constantly in danger from the innumerable situations in which the failure to observe rules would involve them. But these principles so well recognized and generally enforced, do not reach the question we are dealing with. They are applicable to employes who are engaged in some service within the scope of their employment, or that are demanded by an emergency, or performed in obedience to the orders of a superior, or performing some duty that a sudden emergency has imposed. It follows from this that the deceased did not come under the protecting care of the rules, and therefore neither the engineer nor the company is liable in damages for his death, because a careful examination of the record fails to disclose any evidence that even conduces to show that Barnes in standing on the track in front of the tender was performing any duty that he owed to the company. He did not take the position in obedience to a request from any person. Nor did his employment require him to be there. The rule requiring the ringing of the bell before the engine started was not intended for the protection of persons on the track in places where their duties did not require them to be. If Barnes could claim the protection of the rule, so could any other person who might be there. Unless the rules are confined to employes engaged in some duty under the conditions hereinbefore set out, then the rule requiring the ringing of the bell and all other rules established by the company for the operation of its trains and the government and protection of its employes must be held

to be enacted for the benefit of every person whether he be an employe or not, because the fact that Barnes was an employe did not afford him any protection when outside the line of his duty. * * * Unfortunately for Barnes he got on the track for his own convenience or pleasure. The passing train does not help the case, as he was not required to get on the siding and avoid it. He could as well and as easily have taken a position on the other side of the main track, or on the other side of the passing track, or he might have gone into the caboose of the wrecking train, where in truth his place of safety was. But, as he choose to stand on the passing track in front of the tender, he took the risk of the place. The only duty the company owed him was to avoid injury to him after his position of peril was discovered, and there is no evidence whatever to support this view. The rule of the company invoked and under which a recovery was had does not embrace this case. As this rule and its violation is the only negligence relied on in the petition, we feel obliged to say that the request of the defendant for a peremptory instruction should have been granted."

In *Harris vs. Det., etc.*, 70 Atl., 155, it was said:

"A master's duty in respect to furnishing his servants a safe place in which to work extends to such part of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. *Morrison vs. Burgess Sulphite-Fibre Co.*, 70 N. H., 406, 47 Atl., 412, 85 Am. St. Rep. 634. It is not disputed that the defendant company had provided Harris with a safe place to perform his work as a member of the freight gang. It had provided a safe

method of furnishing him with a shovel when needed, and, when he asked for it, was in the act of supplying it, of which he was informed. When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the defendant knew or ought to have known."

In *Morrison vs. Fibre Company*, 47 Atl., 413, it was said:

"A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. *McGill vs. Granite Co.* (N. H.) 46 Atl., 684. If this elevator was a tool or appliance, the defendants owed the plaintiff no duty respecting it at the time of the accident, for he was then putting it to a use for which he knew it was not intended; and, although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended. *Young vs. Railroad Co.*, 69 N. H., 356, 41 Atl., 268."

The principle of the above cases has been applied in *Linguist vs. Plaster Co.*, 117 N. W., 46, where

an employe left work which he had been hired to do and voluntarily engaged in other work about his master's premises which he was not required to do; in *Martin vs. Railway Company*, 27 So. 646, where a railway employe was injured while riding upon an engine where his duty did not require him to be; in *McGill vs. Granite Company*, 46 Atl., 684, where an employe was injured while trying to stop run-away cars upon an employer's premises, it being no part of his duty to do anything with such cars; in *Mining Company vs. Talley*, 43 So., 800, where a miner was injured while going to another part of the mine from that in which his employment lay to obtain from another employe a tool he had loaned him; in *Buckley vs. Railway Company*, 126 N. Y. S., 480, where an engineer in going to his engine took a dangerous course which there was no necessity for him to take, and the use of which by him or any other employe was not authorized; in *Railway Company vs. Holland*, 51 So. 365, where a brakeman went to sleep upon the railway track; and in *Duvall vs. Armour Packing Company*, 95 S. W., 978, where an employe voluntarily undertook to operate a machine which she was not employed to operate and with which she had nothing to do. In addition see the following cases, all cover-

ing and applying the same principle:

Brown vs. Coal Co., 94 N. E., 574.

Atlanta Etc. Co. vs. Ray, 70 Ga., 674.

Central etc. Co. vs. Chapman, 22 S. E., 273.

Chicago etc. Co. vs. Collins, 43 Ill. App. 478.

Railway Co. vs. Cravin, 52 Ill. App. 415.

Railway Co. vs. Admr., 10 S. E. 422.

Whitton vs. Railway Co., 32 S. E. 857.

Railway Co. vs. McWharter, 42 S. E. 82.

Fowler vs. Brooks, 70 Pac. 600.

Maitrejeau vs. Light Co., 46 So. 21.

Schmonske vs. Asphalt Co., 114 N. Y. S., 87.

Railway Co. vs. Bentley, 56 So. 249.

Montgomery C. M. vs. Bowdoin, 58 So. 732.

Gibson vs. Terminal Co., 58 So. 1015.

Railway Co. vs. Stephens, 155 S. W., 703.

Gardstrom vs. Lumber Co., 132 Pac. 842.

Hollenback vs. Stone, 129 Pac. 1059.

Shea vs. Mfg. Co., 132 N. Y. S., 612.

Columbia C. Co. vs. Beard, 99 N. E. 823.

Hardy vs. Railway Co., 87 Atl. 781.

Kennedy vs. Chase, 52 Pac. 33.

While the facts were not strictly analogous, the principle of the above cases was applied by this court in *Russell vs. Railway Company*, 155 Federal

22, where a bridge foreman in defendant's employ took one of its velocipede cars to go some distance down the road to look after some matters in the course of his employment. Those matters attended to he remained several hours visiting a relative near the place where he had gone, and while returning to the boarding car in which he lived, was struck by a train and killed. It was held that he was not in the course of his employment and that, although the trip down the road had originally been for the benefit of his employer, he went without the scope of his employment when he remained there for his own pleasure. To quote:

“Under this evidence, the conclusion is certain that his act in remaining until 8:30 o'clock was his own, and that, in returning when and in the manner he did on the hand car, he was acting for himself. His conduct was no part, whatever, of any business relation of master and servant. It must be held, therefore, as a matter of law, that his attitude became that of a servant who voluntarily stepped wholly aside from the business of the master to do his own pleasure exclusively. Under such conditions, the master is not liable for the servant's death. In *St. Louis Southwestern Ry. Co. vs. Harvey*, 144 Fed. 806, 75 C. C. A. 536, the Court of Appeals of the Eighth Circuit said:

* * * For if a servant step aside from the business of his master for never so short a time to do any act that is not a part of that business, the relation of master and servant is

for the time suspended, and the acts of the servant during that interval are not his master's but his own. *Benson vs. Chicago, St. P. M. & O. Ry. Co.*, 78 Minn. 303, 307, 308, 80 N. W. 1050; *Baker vs. Kinsey*, 38 Cal. 631, 633, 99 Am. Dec. 438; *Georgia Railroad Co. vs. Wood*, 94 Ga. 126, 21 S. E. 288, 47 Am. St. Rep. 146. Nor does the fact that servants guilty of a tortious act make use of the master's cars, engines, or other facilities, which they could not have obtained in the absence of the relation of master and servant, to commit it, while pursuing their own ends exclusively, charge the master with liability for their act, in the absence of his knowledge or consent to such use. *Chicago, St. P., M. O. Ry. Co. vs. Bryant*, 65 Fed. 960, 973-975, 13 C. C. A. 249, 253-255.

* * * Again, as deceased was not doing duty for the company, but was pursuing his own affairs only at the time of his death, he was not in that relationship of fellow service with the engineer or operatives of the special train which enables his administratrix to recover, relying upon the fellow servant statute of the State of Oregon, approved February 10, 1903, entitled "An act imposing upon railroad corporations liability for injury to their employees in certain cases." In *Railroad Co. vs. Wade*, 35 South. 863, 46 Fla. 197, a wife sued for damages for the death of her husband. The deceased was killed near the eastern boundary of a village in a collision between a hand car and a locomotive. In that case the facts showed that the engine was being run backwards in the night, and it was contended that it did not have proper lights and was running at an unusual rate of speed. The deceased was employed as a member of a bridge gang, but had been discharged for the

day, and had borrowed the hand car he was upon from the foreman of the crew of which he was a member. But the court held there could be no recovery, basing its decision upon the ground that the deceased at the time of the accident was not on duty, and was not a fellow servant with the trainmen, and that no relationship of master and servant existed."

While the facts of the foregoing case are not, we admit, analogous with those of the case at bar, the principle involved in the two is not distinguishable. If a servant may ever "step aside from the business of his master" to do an act "that is not a part of that business," most surely plaintiff did in this case when in defiance of his employer's orders he took one of its trains out on the road, and by so doing demolished it and cast his employer in several hundreds of thousands dollars damages.

The law of the subject as settled by the earliest cases has not been unsettled by late legislation. No case is to be found discussing the principle in question in connection with the Federal Employers' Liability Act. Many of the foregoing decisions, however, applied it in cases where state Liability Acts, not dissimilar to the Federal act, were relied upon. It has been applied, too, where recovery was sought under the very latest form

of labor legislation, the workmen's compensation acts which impose an absolute liability where a workman is injured while engaged in his avocation, without regard to whether his employer was negligent. In such cases the sole test of the right of recovery is whether the workman was "in the course of his employment" when injured. The decisions are not numerous, the legislation being so recent, but are weighty.

In *Bryant v. Fissell*, 86 At., 458, appears the only American construction of the phrase "in the course of the employment" as used in such legislation, which the digests disclose. Construing the New Jersey act of 1911, it was there said:

"We conclude, therefore, that an accident arises 'in the course of the employment' if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

The test of reasonable conduct and reasonable place above prescribed is borne out by the practical construction put upon the English and Colonial acts of that ilk. Mr. Labatt, speaking of a similar phrase in those acts, says:

"This phrase embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty

which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business."

5 *Labatt's Master & Servant*, (2d Ed.) §1806.

Going further he gives these illustrations of cases where it has been held that the injured servant was not in the course of his employment when receiving the injury:

"Where a person employed in a factory to do purely unskilled labor, and expressly forbidden to touch any of the machinery, was injured while attempting in violation of such orders, to clean a machine. *Lowe v. Pearson*, (1899) 1 Q. B. (C. A.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124.

Where a driver of a canal boat violated the orders of his employer, and attempted to steer the boat, and was drowned while steering. *Whelan vs. Moore* (1909) 43 Ir. Law. Times (C. A.) 205 (the desertion of another boatman created no emergency justifying the disobedience).

Where a workman tried to get on a moving train contrary to orders. *Pope vs. Hill's Plymouth Co.* (1910) 102 L. T. N. S. 632, 3 B. W. Comp. Cas. 339.

Where a boy at work in a colliery in disobedience to orders got in a tub that was being hauled on an endless chain. *Barnes vs. Nunnery Colliery Co.* (1910) W. N. 248, 45 L. J. N. C. 757.

Where a brakeman was injured by jumping off the seat of a lorry, where he had been ex-

pressly forbidden to go, and where he had no duty to perform. *Revie vs. Cumming*, (1911) S. C. 1032, 48 Scot. L. R. 831.

Where a workman climbed onto a tank to eat his dinner, contrary to orders. *Brice vs. Lloyd* (1909) 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744.

Where a miner's body was found among the *debris* after a shot had been fired in a place where he had been forbidden to go, and no reason was shown for his being there. *Traynor vs. Addie* (1911) 48 Scot. L. R. 820, 4 B. W. Comp. Cas. 357.

Where a girl engaged in passing sheaves undertook, in disobedience to an express prohibition, to step across the opening through which they were fed, merely for the purpose of speaking to a friend, and without any necessity arising out of the work. *Callaghan vs. Maxwell* (1900) 2 Sc. Sess. Cas. 5th series, 420, 37 Scot. L. R. 313, 7 Scot. L. T. 339.

A miner who, after he had been suspended, was directed to go to a certain part of the mine, is not entitled to compensation for injuries while remaining in the place which he had been told to leave. *Smith vs. South Normanton Colliery Co.* (1903) 1 K. B. 204, 72 L. J. K. B. N. S. 76, J. P. 381, 51 Week. Rep. 209, 88 L. T. N. S. 5, 19 Times L. R. 128.

A message boy who, in using a hoist to carry him to the third floor of a building where it was his duty to go, instead of walking up the stairs, knowingly violates his orders, is outside the course of his employment. *McDaid vs. Steel* (1911) S. C. 859, 48 Scot. L. R. 765, 4 B. W. Comp. Cas. 412.

An accident caused by a workman going into place where he has been forbidden to go does

not "arise out of" the employment. *Powell vs. Lanarkshire Steel Co.* (1904) 6 Sc. Sess. Cas. 5th series, 1030."

Ibid, §1806, note 3.

Other illustrations cited by the author at page 5429 are where a miner took an obviously dangerous path from the pit; where a workman left his work by an unauthorized route; where an engine driver went across the rails for his own purposes, his proper path not crossing the rails at all; where a workman in going home crossed a railway siding, committing trespass in so doing, though two safe exits had been provided for him. In each of such cases it was held the accident did not arise "out of and in the course of the employment."

The gist of the above decisions is unmistakable. They deal with the most advanced labor legislation; with legislation which abolishes not merely all the affirmative defenses to actions brought by injured employes against their employers, but as well makes the sole test of right of recovery to be that the employe was in the discharge of his duties, in the course of his employment, when injured. But such legislation, as construed by the courts, still requires reasonable conduct from the workman, a reasonable degree of obedience to that which his employer may prescribe for the safe conduct of

his business. The contractual relation of master and servant is still a voluntary one on both sides, and in the contract of hiring the master may still stipulate that as a condition thereto the servant shall keep within such reasonable limits, not inconsistent with the policy of the state, as may be prescribed. Whenever the servant needlessly, under no stress and in the presence of no emergency, goes beyond those limits without order, express or implied, of the master, he exceeds the contract of hiring and, being without it, may not claim the privileges and protections to which he would have been entitled had he kept within it.

Put in another way, it has ever been a fundamental principle of the law of contracts that if one party to a contract does not abide by its valid stipulations he may not claim damages occasioned by his breach of it from the other party. The rule holds good in contracts of hiring, whether under the common law, the Employers' Liability Acts, or the Workmen's Compensation Acts. The master may require the servant to obey his reasonable rules and orders, and when the servant without excuse fails to do so, he has breached the contract and may not claim the protection to which he would have been entitled had he performed it.

Applying the abstract to the concrete, the law

demands of a railway company that it make such rules and give such orders with respect to the conduct of its business as shall tend to preserve the traveling public and its employes from injury. If those rules and orders are not promptly and invariably obeyed, it were better they were not promulgated, for with disregard they become snares for all concerned. In no contract of employment so much as in that of the railway employe does the law write, emphatically and sternly, that the employe must live up to the employer's rules and obey the employer's orders, for in no other employment are disregard and disobedience so certain to be attended with disastrous results. The law has recognized the hazards of that employment by safeguarding it as no other employment is safeguarded, and demanding from railway companies implicit and absolute obedience to the law's requirements. Such inflexibility with one party forbids laxity with the other. The railway employe who is injured in the course of his employment may demand the pound of flesh from his employer. But he may not ask one drop of blood, and if he appeals to the rigors of the law, by the law must he be judged. If he has stepped aside from his master's service, has flouted its commands and refused obedience to its rules and by reason of his contumacious conduct

been injured, then he has broken the law and his contract alike and may not claim the protection of either.

An attempt may be made to confuse the principle here invoked with the doctrine of contributory negligence, and it be argued that it is inapplicable to this case because the Liability Act has done away with the defense of contributory negligence. There is nothing in common between the two rules. The one upon which we rely goes to the question of whether a cause of action was made out against defendant; the other goes to the question of whether, a cause of action established, it may be defeated by a showing of plaintiff's negligence. Defendant insists that no case was made against it because it appears that plaintiff was not in the course of his employment when he was injured; that because he had stepped aside from his service it owed him no other duty than it would a trespasser or licensee on its track, and no breach of such duty is disclosed by the evidence. The case is like that of *Railway Company v. Chapman, supra*, where the defendant wished to show that the plaintiff was injured while attempting, in an intoxicated condition, to take charge of an engine, such an act being a violation of law. The court said of the question of his intoxication: "Its

relevancy to the case inheres in the question as to the defendant's negligence rather than in the question as to the plaintiff's contributory negligence." So it is here. The jury have found that the proximate cause of plaintiff's injury was his act in leaving Coeur d'Alene in violation of his orders. In doing so he was under no stress or strain, no emergency confronted him, and no excuse of any sort is offered for his conduct. He appears, then, to have voluntarily departed from his duty, and broken the obligation he had assumed to the defendant. Such an act may not be called negligence. Suppose that he had gone into the defendant's yards at night and taken one of its cars and run it over the road for his own pleasure or profit. Would his act be called contributory negligence if he were injured while on the trip? Manifestly not, but on the authority of this court in the *Russell* case, or of the Court of Appeals for the Eighth Circuit in the more analogous case of *Railway Company v. Bryant*, 65 Fed. 969, it would be said he was not in the course of his employment and for that reason alone was entitled to no relief. Or suppose that when plaintiff reached Coeur d'Alene with his train the superintendent had ordered him to put his train on a siding and go off duty. If in violation

of such orders he had filled his train with passengers and started for Spokane, without orders, could his act be called contributory negligence if he brought the train into collision with another train because of his unauthorized and disobedient action? Hardly not, we think, if there be legal principles, the distinctions between which are to be observed. Go then to the actual case. Plaintiff admits that he knew No. 20 was somewhere on the road, approaching Coeur d'Alene, and that it was then due at Coeur d'Alene. He admits that he had no right to leave Coeur d'Alene until No. 20 came in unless he had telegraphic orders from the dispatcher at Spokane authorizing him to do so. He bases his case upon having such orders, testifying that he received them, read them, clearly understood them, and that they were for him to meet No. 20 at Alan. The jury found he had no such orders, that he had no orders against No. 20, and that the orders he received were to meet Special 4 at Alan. Do not the actual facts put him as much beyond the pale of his employment as the supposititious ones? Are they not, under the admitted facts even more convicting? No. 20 was due, it was a regular train, had the right of way, and it was plaintiff's duty to clear it by five minutes. For him to take his train out under such circumstances

was to make disaster inevitable unless some lucky chance prevented. In doing so he violated his orders, violated his duty, violated the law. Surely it was not needed that in the contract of employment defendant should have expressly stipulated that while in its service plaintiff should do what his duty required of him, should obey such rules as might be prescribed and such orders as might be given, and should keep within the law, in order to restrain him within such limits. "It will not be presumed that a master whose occupation is lawful invites a servant to come upon his premises or to use his instrumentalities to violate the law." *Railway Co. v. Chapman, supra*. "If the employe will not conform to (the employer's regulations) to the extent that he reasonably can, and suffers an injury not wantonly inflicted, he forfeits his claim to protection from his employer, and must himself bear the consequences." *Railway Company v. Doty, supra*. "Where the servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended." *Burnett v. Mills Co., supra*. "Though in a place where his duty requires him to be, a servant may nevertheless so conduct himself as to be outside the scope of his employment." *Williamson v. Berlin Mills Co.,*

supra. An employe is within the course of his employment while he is "doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." *Bryant v. Fissell, supra*.

No reasonable person, it is true, can conceive why plaintiff should have done what he did. But is the utter unreasonableness of his act cause for holding it to be within the scope of his employment? Quite the contrary, say the authorities above cited. He was certainly not doing what he might be reasonably expected to do during the time he was employed, nor was he in a place where he might reasonably be during that time. Negligent he was, of course. Criminal he was, too. But both negligence and criminality were in a matter wholly without the scope of his employment, in a place he was forbidden to be, and doing an act he was forbidden to do. To say his employer may be held liable to him for the consequences of his act under such circumstances, on the theory that though he had flouted it, disobeyed its orders, and done what it had commanded him not to do, he was still in its service and entitled to the high degree of care it owed employes who were in the discharge of their duties, would be to declare a rule no court

in Christendom has ever sanctioned.

The law will not weigh with too fine a balance the wisdom or propriety of an act done by a railway employe while actively engaged in the discharge of his duties; while switching cars; while running his train over the road; while bringing it down through extensive yards into the station in a city. If then an automatic coupler fails to work and he endeavors to adjust it while the cars are moving instead of bringing them to a stop, or he runs over a dangerous bit of track too rapidly, or fails to heed or see a danger signal, the law calls the act negligent, and Congress has provided that, given such negligence on the employer's part as will make a cause of action, the employe's negligence of such a character will not defeat it. There is no such case here. Paintiff's train was in a terminal station and had stood there for 10 or 15 minutes. During that whole time a regular train was due. He knew he must not leave Coeur d'Alene until that train came unless the dispatcher gave him telegraphic orders to do so. He received orders which he read; read them coolly and carefully, he says, and understood them thoroughly. Because, as he says, they gave him permission to go, he took his train out. The jury have found that he testified falsely as to the nature of his orders,

and that finding leaves him without justification for what he did. He says he had no right to leave Coeur d'Alene without orders against No. 20, and the jury have found he had no such orders. He stands convicted of acting in deliberate violation of the rules of the company, of his duty, and of the law. When he did so he broke the obligations he owed the defendant as his employer, and it no longer owed him any duty as its employe.

(b) The trial judge submitted to the jury the question of what was the proximate cause of the accident, reading to them the definition of proximate cause found in the opinion in *Milwaukee etc. Co. vs. Kellogg*, 94 U. S., 469, and charging that if they found that plaintiff left Coeur d'Alene in violation of his orders, and such act was the proximate cause of the accident, then he could not recover. Ordinarily the question of what is the proximate cause of an injury is one of fact for the jury (*Railway Co. vs. Kellogg, supra*), but the trial judge considered the finding of the jury as to that fact to be deprived of all value by the finding with respect to the brakes, such finding showing a concurring cause. This, of course, in pursuance of his theory that he could look only to the pleadings and the findings to ascertain the meaning of the findings.

Construing the findings in the light of the entire

record, as under the state practice we may, it is apparent that when the jury found as matter of fact that the proximate cause of the disaster was the act of plaintiff in leaving Coeur d'Alene in violation of his orders, the legal effect of their finding was in no way weakened by their further finding that "the air brakes on Campbell's train immediately before the collision (were) insufficient to enable Campbell to control the speed of the train."

"Proximate cause" is defined in *Railway Company vs. Kellogg* (94 U. S. 469), from which the trial judge read to the jury, in these words:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the

injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

There is an interesting application of the principle in *Insurance Company vs. Boon*, 95 U. S., 117. Fire insurance policies had been written which provided that the insurer should not be liable for loss by fire "which may happen or take place by means of any invasion * * * or of any military or usurped power. The insured property was in a town where were considerable quantities of military stores, which was occupied by the Federal troops during the civil war. It was attacked by

the rebels, and it becoming apparent to the union commander that he could not successfully defend the place, he ordered fire set to the building in which were the military goods, in order to prevent them falling into the enemy's hands. The fire spread to the insured property, and in an action on the policies the question was whether the resultant loss was proximately caused by the rebel attack or by the act of the union commander in setting fire to the military stores, for in the former event the insurer would not be liable; in the latter it would. It was held that though the loss was immediately caused by the act of the union commander in setting the fire, it was *proximately* caused by the antecedent rebel attack, and so the insurer was not liable. Said the court:

“The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. * * *

“The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *Milwaukee & St. Paul Railway Co. vs. Kellogg*, 94 U. S., 469, we

said, in considering what is the proximate and what the remote cause of an injury, "The inquiry must always be whether there was any intermediate cause *disconnected from the primary fault*, and self-operating, which produced the injury." In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power—events so linked together as to form one continuous whole."

To apply the principles above settled to the facts of the particular case.

Plaintiff's wrongful act in leaving Coeur d'Alene in violation of his orders was the efficient cause of the collision. Had plaintiff's train not been wrongfully out on the road, bearing down upon No. 20 at 30 miles an hour, the condition of the brakes, no matter how insufficient they may be presumed to have been, would not have been a factor in causing the wreck. Moreover, the evidence proves the brakes to have been sufficient for any normal use. There is no weighing of evidence or passing upon facts when, for the purpose of arriving at the meaning of the jury's finding with respect to the air brakes, we accept plaintiff's testimony relating thereto unreservedly. It shows the brakes to have

been of standard make, to have worked perfectly under the use to which they were subjected in the normal operation of the train, and to have taken hold perfectly under the stress of "dynamiting." The sole evidence of insufficiency, if such it may be called, is that after holding a second under that strain they released without apparent cause. The collision followed in another second or two, before plaintiff could attempt to do anything with them. Though saying that neither he nor any one else knows why the brakes released, plaintiff guessed at several causes, one of which was that a piece of dirt might have gotten into the valves, which did not interfere with the working of the brakes in their ordinary use, but affected them under the extraordinary strain of dynamiting; another that a cylinder may have broken from too hard an application; another that a cylinder, or train pipe, or brake beam, might have broken because the brakes were not applied properly. Now the jury did not find that the brakes were defective or insufficient for the safe operation of the train in ordinary use. It was only that "immediately before the collision" they were "insufficient to enable Campbell to control the speed of the train." The most unfavorable inference to defendant which may be drawn from the finding, read in the light

of plaintiff's testimony, is that there was some latent defect in them which, while not interfering with their perfect operation under normal conditions and mode of operation, rendered them unable to withstand the extraordinary strain plaintiff put upon them in the attempt to avoid the collision.

That being true, the language used in the *Boon* case is strikingly applicable here. Plaintiff's wrongful act in exposing his train to a collision with No. 20 was the efficient cause of the collision. If it may be said that the failure of the brakes to work was also a cause, that cause "was an incident, a necessary incident and consequence" of the efficient, the superior, the controlling cause—plaintiff's wrongful act. Only because of that act was it necessary to resort to the brakes at all, and it was solely because of that act that they failed to work, that act alone causing them to be exposed to the extraordinary strain of dynamiting. Such a failure was therefore "one of a continuous chain of events brought into being" by plaintiff's wrong—"events so linked together as to form one continuous whole."

In *City of Winona vs. Botzet*, 169 Fed., 321, a whistle was blown, frightening a team of horses which was being driven past and causing them to

run away, and, upon the giving way of parts of the harness and vehicle, causing injury to the occupants of the vehicle. In an action to recover damages for such injuries the defendant invoked the doctrine of proximate cause. Said the court in that behalf:

“Nor can the contention be sustained that the unhooking of the tugs, the breaking of the pole, or any of the other events between the blowing of the whistle and the injuries and death was, and the blast of the whistle was not, the proximate cause of those dire effects. The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the original wrongful act or omission from the injury and relieve of liability for it must be an independent, intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission and produces a different result which could not have been reasonably anticipated. *Union Pacific Ry. Co. v. Callaghan*, 6 C. C. A. 205, 210, 56 Fed. 988, 993, 994; *Cole vs. German Savings & Loan Soc.*, 59 C. C. A. 593, 597, 600, 124 Fed. 113, 17, 20, 63 L. R. A. 416. The blast of this whistle was the primary moving cause without which the accident would not have happened. It was the cause which set in motion all the other events, the cause which set the horses into a dead run, made them uncontrollable, brought about the unhooking of the tugs, the breaking of the pole,

the crash of the wagon against the railing, and the throwing of its occupants to the ground below. All these intermediate acts were dependent, not independent, causes. They were mere links in the chain of causation between the blowing of the whistle and the injuries and death it produced, and were themselves caused by the blast of the whistle."

So here plaintiff's act in leaving Coeur d'Alene in violation of his orders was "the primary moving cause" without which the collision would not have occurred. It "set in motion all the other events." It caused an unusual strain to be placed on the air brakes, and that unusual strain or some other unexplained cause occasioned brakes which had always theretofore worked perfectly to fail to operate. The failure of the brakes was a mere link in the chain of causation between plaintiff's wrong and the injury it produced, and was itself caused by the original wrongful act.

In *Union Pacific Railway Company vs. Callahan*, 56 Fed. 988, a repair train was sent out for the purpose of repairing wash-outs on a railway line. A section foreman discovered a bridge in his section to be in an unsafe condition and placed the usual danger signal, a red flag, between the rails about 700 feet from the bridge. He then went back to a station and when the repair train approached the station he signalled it to stop, intending to in-

form those in charge of it of the danger ahead. The engineer saw his signal, responded to it, and slackened the speed of the train to about four miles an hour, and would have stopped the train but that the conductor signalled him to go ahead, and he thereupon went on before the section foreman could inform him of the danger. Under the rules of the road the engineer should have looked out and have seen the danger signal the section foreman had put out near the bridge, but he failed to do so and in consequence of such failure the train was wrecked and one of the repair men upon it was injured. The conductor on the train was deemed the injured man's vice principal, and so the question arose whether the proximate cause of the accident was the negligence of the conductor in failing to heed the section foreman's signal to stop at the station, or the negligence of the engineer, who was the plaintiff's fellow servant, in failing to observe the danger signal at the bridge and stop before going upon it. Holding that the conductor's negligence was the proximate cause of the injury the court said:

“The negligence of the engineer was not an intervening cause that interrupted or turned aside the natural sequence of events, or prevented the natural and probable effect of the conductor's negligence. It simply failed to

interpose the engineer's care to prevent this probable result, and left the natural sequence of events to flow on undisturbed to the fatal effect. It may be true that, if the engineer had seen and obeyed the danger signal on the track, or had seen the damage to the bridge, and had stopped the train, the accident would not have happened; but his failure was but the concurring or succeeding negligence of a servant, which permitted the conductor's breach of duty to work out undisturbed the disastrous result of which it was the primary and efficient cause. * * *

"The independent intervening cause that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated."

Certainly it cannot be said that the failure of the brakes to work was a cause which interrupted the natural sequence of events, turned aside their course, and prevented the natural and probable result of plaintiff's wrong. The faultless working of the brakes, indeed, was all that would have produced "a different result," one "that could not have been reasonably anticipated."

In *Pittsburg etc. Co. vs. Sudhoff*, 88 N. E., 702, a helper engine was detached from a train which it had been assisting over a grade and run ahead

to a siding, where a switch was turned in order that it might pass upon the siding by a brakeman upon the helper engine, who for such purpose was under the control of the engineer. The helper engine passed upon the siding but the brakeman failed to close the switch. The switch had no light upon it, and a rule of the company which was understood by the engineer of the following train was that the absence of a light upon a switch was a signal for the train to stop, unless he received a signal from those in charge of the helper engine to come ahead. He received no such signal, but nevertheless did not stop; ran his train down upon the open switch and through it upon the siding and into collision with the helper engine, killing the engineer. Speaking of the doctrine of proximate cause the court said:

“It is further insisted in argument that the act of the deceased engineer in running his train upon the side track and of the negligent brakeman in failing to close the switch after the decedent’s engine had passed onto the side track were new and independent causes intervening between the negligence complained of and the injury. The proximate cause of the injury complained of was the sufficient cause. Other causes co-operating were merely incidental or conditions that gave to the efficient cause the opportunity to effect the injury. It is said in *Indianapolis, etc. Co vs. Schmidt*, 163 Ind. 361, 71 N. E., 201, that, when several causes conspire to bring about a resultant in-

jury, the more scientific inquiry seems to be whether or not one is not the efficient and others merely the incidental causes. Here the efficient cause of the injury was clearly the collision of the two engines. The running of the engine drawing the freight train in collision with the decedent's engine was the thing that produced the injury, and the running of this engine down over the switch, in the face of the signal to stop, and without a signal to come on, is the negligence complained of, and is the negligent act which the jury find to have been established. The open switch was not only antecedent in point of time—that is, it did not intervene between the negligent act of the engineer drawing the freight train complained of and the injury—but it would of itself have been entirely harmless but for the negligence of the engineer in failing to abide by the rules of the company. *Terre Haute etc. Co. vs. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *New York etc. Co. vs. Perriguey*, 138 Ind. 42, 34, N. E. 233, 37 N. E. 976; *Alexander vs. Town of New Castle*, 115 Ind. 51, 17 N. E. 200; *Louisville etc. Co. vs. Noland*, 135 Ind. 67, 34 N. E. 710. It is said in *Terre Haute etc. Co. vs. Buck*, *supra*: 'To entitle a party charged with negligence to exemption, he must show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done.' In *New York etc. Co. vs. Perriguey*, *supra*, quoting from *Milwaukee etc. vs. Kellogg*, *supra*, it is said: 'The inquiry, therefor, must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' Here the open switch was not only an intermediate cause, but it would not of itself have caused the injury. We think it must be held that the negligence of

the engineer drawing the freight train in running his train over the switch, the switch light being out, and without a signal from the train crew of the decedent's engine to come on, was the proximate cause of the injury from which appellee's intestate died."

Quite similar in principle is *New York etc. Co. vs. Perigey*, 34 N. E. 233. There engine No. 172 was sent out upon the road with instructions to run to Argos and lay up for No. 167. When No. 172 reached Argos someone told the engineer that No. 167 had already passed, whereupon in defiance of his orders he left Argos and proceeded on his way. When he had gone about two miles beyond Argos he saw No. 167 approaching and brought his train to a stop. It was in the night time, and the headlight on No. 172 was so defective that it could not be seen, and consequently those in charge of No. 167 came down upon No. 172 without being aware of its presence on the track and ran into it, inflicting injuries upon the plaintiff, who was the fireman on No. 167. The negligence charged was that of the engineer of No. 172 in running past Argos, and in the failure of the company to equip No. 172 with a headlight before sending it out on the road at night. The jury found that the defective headlight was the proximate cause of the collision and the plaintiff's injury. The court held

that this conclusion was not supported by any evidence, saying:

“So, in the case before us, the negligence of the appellant made it possible for Ferris to set the dangerous obstruction upon the railway, but it was his act in placing it there, in violation of expressed instructions, that caused the injury. It was not negligence for the appellant to have left its engine standing in its yards, in a proper place, for repairs, nor was it negligence to have left it upon a siding at Argos, until No. 167 had arrived and passed. So standing it was harmless. That it would have been moved out upon the main track in the face of an approaching train, in violation of the direct orders of the company, could not have been reasonably anticipated by the appellant. No reasonable prudence and foresight could have determined upon such a result without a knowledge of the recklessness and ignorance of the engineer—a fact here found to have been unknown. Suppose this suit were against Ferris for the damages resulting to appellant’s engines, or by the appellee for his injuries, could he assert with reason that his negligence was not the proximate cause of the collision? Suppose the conduct of Ferris, in promoting the collision, to have been wanton or willful; could it be said that the prior negligence of the company was the proximate cause of the collision? We believe not. The movement of the train under the management of Ferris was the independent wrongful act of a responsible person. Such act of Ferris was not induced by the act of the appellant, nor did the act of Ferris so operate on the act of the appellant as to cause appellant’s act to produce the injury. If it had so operated, according to the authority we have cited, respon-

sibility would not attach to the appellant's act. The absence of the headlight was not the cause of the injury. Such absence was but an incident to the appellee's failure to avert the collision. We cannot escape the conclusion that the wrongful act of Ferris was the immediate cause of the injury."

Upon the foregoing authorities, we submit that plaintiff's act in leaving Coeur d'Alene in violation of his orders when No. 20 was approaching, whereby a collision between the two trains would be inevitable unless some lucky chance operated to avert it, was the efficient cause of the collision, the one which necessarily brought it about. The utmost that can be said of the failure of the brakes to work as a cause for the accident was that such failure deprived the plaintiff of one chance which he had among several which might be imagined to avert the consequences of his own wrongful act. The disaster might have been averted in many ways. A switch might have been turned at the wye in the west end of the Coeur d'Alene yards, or the east switch at Gibbs, and plaintiff's train have been derailed. Plaintiff might have been keeping a lookout on the track ahead of him instead of occupying himself with the time card and fixing the cushion of his seat, and so have seen No. 20 in time to have stopped his train with the normal application of the brakes or with his reverse apparatus.

The motorman of No. 20 might have seen plaintiff's train in time not merely to have brought his train to a full stop, as he did, but to reverse his motor and thus have run away from plaintiff's mad charge down upon him. But all those things were mere opportunities which there might have been for averting the consequences of plaintiff's own wrong, and to say that the failure of any one of them to avert the wreck was the proximate cause of the collision is absurd. The dominant cause was plaintiff's wrongful act in leaving Coeur d'Alene, and that was the proximate cause of the collision. All the other opportunities to avert the consequences of his act, whether the real opportunity suggested by the evidence or the supposititious opportunities which occur to the imagination, were mere incidents to the final working out of the original cause to its natural result.

It is certainly an innovation upon the rules of law governing any relation in life to say that one whose own wrongful act is the proximate cause of an injury being done him may recover damages from another because such other failed to do something which would have averted the consequences of the wrongful act. The case at bar is stronger than that stated, because the findings of the jury show plaintiff to have been engaged in the commis-

sion of an unlawful act when he was injured. He was in charge of the wrecked train, and he endangered the lives of those upon it when he took his train out of Coeur d'Alene in the face of the regular train, which had the right of way, and he fully compassed his crime when he crashed into the other train, killing eighteen persons who were passengers on his train.

In *Lloyd vs. Railway Company*, 66 S. E., 604, the plaintiff alleged that he was a fireman on one of the defendant's trains; that he was required to remain on duty for more than sixteen hours without rest, in violation of a statute of North Carolina, and that in endeavoring to board his train he missed his hold, fell and was injured because he was so weakened by his long service without rest that he could not properly look out for himself. The court, construing the statute in question, held that it forbade the employes to whom it applied, in which class plaintiff was, from working more than sixteen hours, and that the plaintiff himself was guilty of a violation of the statute when he remained on duty for more than sixteen hours, and being therefore in the commission of an unlawful act, that he could not recover.

“It is very generally held, universally so far as we are aware, that an action never lies when

a plaintiff must base his claim, in whole or in part on a violation by himself of the criminal or penal laws of the state. In *I Waite's Actions and Defenses*, p. 43, the principle is broadly stated as follows: "No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which its law declares to be illegal"—citing *Davidson vs. Lanier*, 4 Wall, 447, 18 L. Ed. 377; *Rolfe vs. Delmer*, 7 Rob. (N. Y.) 80; *Stewartson vs. Lathrop*, 12 Gray (Mass.) 52; *Howard vs. Harris*, 8 Allen (Mass.) 297; *Pearce vs. Brooks*, L. R. 1 Exch. 213; *Smith vs. White*, L. R. 1 Eq Cases, 626. And this statement of the doctrine is supported and fortified by numerous decisions here and elsewhere." (Citing cases.)

No wrong can be greater than the disobedience of orders by a man entrusted with the control of a railway train.

"It is indispensable to the safety of the traveling public that rules like the ones we have been considering should be literally obeyed by trainmen, and when a trainman whose duty it is to obey these rules is injured as a result of their violation, it is well settled that he cannot recover damages from the company. As said in *Sinclair's Adm'r vs. I. C. R. Co.*, 100 S. W., 236, 30 Ky. Law Rep. 1040: 'Absolute obedience to orders regulating the movement of trains is indispensable to the safety of life and the protection of property, and carriers engaged in the hazardous business of transportation by modern methods have the right to demand the highest efficiency in the service, and to exact implicit obedience to the orders of superiors, and to establish and enforce rules

for the discipline of their employes. It is not the purpose of the courts to encourage in any way violations by employes of reasonable rules by relieving them of the consequences of their wrongful acts, or to subject the company to damages caused by their disobedience.' In *L. & N. R. Co. vs. Scanlon*, 60 S. W., 643, 22 Ky. Law Rep. 1400, we said: 'The responsible trainman who violates such reasonable rules, of which he has knowledge, and which he has undertaken to regard, must needs take upon himself the personal consequences of his dereliction. If injury results to him by reason of such violation, and which would not, in any probability, have occurred but for it, he alone should suffer the consequences of his fault.' "

Louisville, etc. Co. vs. Moran, 146 S. W., 1135.

The State of Idaho recognized how essential it was that trainmen should attend strictly to their duties and obey the rules and orders given them by making it a crime for any person in charge of a train either to endanger the lives of the passengers thereon or to cause death or injury to them by his neglect. The wreck out of which this action grew, with all its tragic consequences, the death of eighteen persons, the injuring and maiming of so many others, shows how absolutely essential it is that trainmen shall be held to the highest standard of attention to their duties and obedience to their orders. The plaintiff cannot recover in this case unless he is permitted to found his right of action

upon willful disobedience of his orders and the violation of the statute. Surely it needs no very extensive citation of authorities to establish that no cause of action can spring from such sources.

The doctrine of contributory negligence, once the bugbear of plaintiffs in personal injury cases, now the refuge of all the undeserving who can sue under the Federal Liability Act, may be invoked, and it be said that to hold plaintiff's wrong to be the proximate cause of his injury is merely to convict him of negligence which contributed to his injury, and therefore no defense is disclosed. Such an argument would only expose an inability to distinguish legal principles. Proximate cause does not usually have to do with defenses, not at all with affirmative defenses, such as contributory negligence. It goes to the root of the action, and by the application of its rules it must be determined whether a cause of action exists. There is a cause for every injury; a dominant, efficient cause which set in motion the train of events which culminated in the injury. There may be more than one such cause, as where the engineer of a locomotive and the motorman of a street car crash into each other at a street crossing because both have disregarded rules, orders and signals. There may be but one such cause, as where a train having the right of

way is run into by another train which should have been on a siding miles away. Intermediate these two perfectly plain cases are the great number in which it is difficult to trace the injury to the original efficient cause or causes. But it must always be traced there, else no cause of action will be made out, for the law will no more permit an action to be based upon remote, speculative or conjectural causes than it will award damages which are remote, speculative or conjectural. In the vast number of cases there are events occurring between the cause and the result which have some relation to them; some near, some remote. In all such, had the intermediate events taken some other course than they did, the injurious result might have been avoided. But that does not make them the dominant, efficient causes of the injury. If the first or second person at whom the lighted squib was thrown had struck it into a vacant place, injury would not have resulted. But their failure to do so did not render them the proximate causes of the injury which resulted. An engineer leaves a station in violation of his orders, and word is wired to various points on the line to stop him before he comes in collision with an approaching train. Through neglect here and neglect there he is not stopped, and a collision results. His wrongful

act still remains the proximate cause of the collision. No more can be said of the neglect of the employes who failed to signal him to stop than that it failed to interrupt and turn aside the natural course of events, and permitted the wrongful act of the engineer to work out its logical results.

Suppose there were no Federal Liability Act, and plaintiff had pleaded for his cause of action against defendant the facts which the jury have found, *viz.*, that he left Coeur d'Alene in violation of his orders and in the face of an approaching train which had the right of way; that he saw the other train in time to have stopped his train and avoided the collision, but for some unknown reason the brakes failed to work perfectly under the extraordinary strain put upon them in the effort to avoid the collision. It would, of course, be held he had no cause of action. And why? Because the proximate cause of his injury was not negligence on defendant's part, but his own wrong in violating orders and going out on the time of the other train. Defendant, evidently, could only be held for negligence on its part which caused the injury. Now the cause of an injury, in the sense in which that word is used in determining whether a cause of action exists, is its proximate cause. All remote and incidental causes are dis-

regarded. Putting contributory negligence entirely out of the case, it would be held that when plaintiff pleaded that he was in a position of peril without fault on defendant's part, and the only negligence pleaded against defendant was that it failed to provide him with adequate means to avert the peril, it having no reason to suppose he would go into such peril, he stated no cause of action. The proximate cause of the injury was his own wrong, and the negligence of the company in failing to provide him means to extricate himself from the position of peril in which he had put himself was only a remote cause; one upon which an action could not be based.

The Liability Act has made no change in the law with respect to causes of action. The law of proximate cause remains as it was. Under the act many familiar defenses are no more. The terms "fellow servants" and "contributory negligence" have lost all their meaning, and "assumption of risks" is but a shadow of its former self. But nowhere in the act may any expression be found which lends support to the notion that an act which has tended only remotely or incidentally to cause an injury, or has failed to prevent some other act "to work out undisturbed the disastrous result of which it was the primary and efficient

cause," is actionable. Where an injury results "from the negligence" of any employe of an interstate carrer, or "by reason of any defect or insufficiency, due to its negligence" in its ways or appliances, the carrier is liable. Lacking any new or extended definition of negligence, or prescription of liability therefor, in the act, we must, under well understood rules, determine what was intended from the existing law. Seeking there, we find that in order that one may be held liable for injury caused by his negligence, his negligence must be the proximate cause of the injury. And the courts hold that rule prevails under the Liability Act as it ever did.

"The case, as has been said already, arises under the act of Congress fixing the liability of interstate railroads for injuries to their employes, and is determinable by its provisions. Under that act the doctrine of *respondeat superior* applies in favor of an injured servant, and what is known as the "fellow servant doctrine" is practically abolished. Contributory negligence on the part of the injured servant diminishes, but does not defeat, a recovery. The defense of assumption of risk was not abolished, however, except in cases where the servant was injured through the violations by the master of some 'statute enacted for the safety of employes.' The questions of negligence and of proximate cause are still to be determined according to the general existing rules on that subject."

Bowers vs. Railway Co., 73 S. E., 677.

Holding that the Federal Employers' Liability Act superseded, so far as interstate commerce was concerned, a state statute which made the mere occurrence of an accident *prima facie* evidence of negligence, and that consequently there was error in submitting the case under the provisions of the state statute, it was said:

"It will be noticed that the Ohio statute differs radically from the Employers' Liability Act in giving a basis upon which the recovery can be had, since under section 6243 of the Ohio statute a *prima facie* case of negligence on the part of the employer is made out when any defect or unsafe condition is shown in the cars, while under the federal statute the plaintiff must show negligence under the rules ordinarily applicable to cases of that character."

Railway Company vs. Finan's Adm'x., 155 S. W., 742.

In *Railway Company vs. Fulghan*, 181 Fed., 91, in an action based upon both the Employers' Liability Act and the Safety Appliance Act, the court quoting approvingly from the much cited case of *Patton vs. Railway Company*, 179 U. S., 658, said:

"The application of these rules to the facts disclosed by this record necessitates a reversal of the judgment below. The case came to the trial court with the legal presumption that the defendant had furnished and maintained a lawful and operative lever and automatic coupler, for the legal presumption is that

every one obeys the laws and discharges his duty. The plaintiff averred that the defendant had negligently failed to maintain a lawful lift pin lever and coupler and that this failure had caused the deceased to step between the cars and be killed. He proved that Pogue stepped between the cars and was killed, but he produced no evidence that the lift pin lever did not open the coupler when Pogue jerked it, or that the lever or the coupler were in any way defective or inoperative. All the witnesses who examined the coupler or the lever before or after the accident found them operative and in perfect condition. The result is that the conclusion of the jury that the coupler was defective was a mere conjecture; that there was no evidence in the case of any such defect; that the legal presumption that the defendant had furnished and maintained a lawful coupler was not overcome, but still prevailed; that this presumption was sustained by the evidence of all the witnesses who examined the coupling apparatus; and that the guess of the jury was without substantial evidence to sustain it.

The doctrine of *res ipsa loquitur* is inapplicable to actions between employers and employes for negligence or other wrongs. The happening of an accident which injures an employe raises no presumption of wrong or negligence by the employer. *Chicago & Northwestern Ry. Co. vs. O'Brien*, 67 C. C. A., 421, 424, 426, 132 Fed., 593, 596, 598; *Northern Pacific Ry. Co. vs. Dixon*, 139 Fed., 737, 740, 71 C. C. A., 555, 558; *Cryder vs. Chicago, R. I. & Pac. Ry. Co.*, 81 C. C. A., 559, 561, 152 Fed., 417, 419.

Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally

guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it."

In *Lyddy vs. Railway Company*, 197 Fed. 524, an interstate train was being moved with several cars in it having defective coupling apparatus, in violation of the Safety Appliance Act. There was also a leak in the air brakes on one of the cars. The train stopped at a coal chute and one of the brakemen went forward for some purpose, what, does not appear. The train was moved backward a short distance and someone cried out that a man was hurt, and the brakeman was discovered lying by the side of the track so injured that he died as a result of his injury. A small piece of flesh was found on the end of one of the defective cars and the angle-cock of the air brake of the second defective car had been turned, which had the effect of cutting off the air from that car. Discussing the facts in the case as to whether there was sufficient evidence to go to the jury concerning the negligence of the railway company, it was said:

"It is not necessary to dwell longer on the facts. Neither the conductor nor the engineer nor any one connected with the train,

except only Lyddy, had, so far as the record shows, any reason to anticipate an attempt on his part to go between the defective cars at the time and in the circumstances shown. For a person to enter a place of such obvious danger, without giving notice or warning, would be quite unnatural, and, despite the presence of the defective cars, to charge the defendant with responsibility for Lyddy's act is to ignore plain and familiar rules of proximate and remote causes; but we do not rest the decision on these rules alone. On the face of the evidence introduced by plaintiff (defendant having offered no evidence), the unfortunate brakeman was clearly open to the charge of contributory negligence, and the facts shown permit no other inference."

While the court rested the decision upon the ground of contributory negligence as well as the doctrine of proximate cause, as it might do in that case, the accident having occurred prior to the enactment of the Employer's Liability Act, it shows a clear recognition that the federal acts were not intended to abrogate the rule of proximate cause and the necessity for proving negligence. To the same effect, and declaring of appropriate facts that "no recovery can be had unless the evidence warrants a verdict that the hostler's negligence was a proximate cause of the accident," is *Smith v. Railway Co.*, 200 Fed. 553.

In *Railway Company vs. McWhirter*, 229 U. S., 265, a brakeman who was working after having

been on duty sixteen hours, in violation of the Hours of Service Act, fell in front of an engine as he was going forward to turn a switch. There was no evidence as to the cause for his fall. The lower court held that the happening of the accident after the brakeman had been employed over the time permitted by statute made out a *prima facie* case of negligence. The Supreme Court held this was error, saying:

“In giving to the statute the construction above stated we think error was committed. The Hours of Service Act was approved March 4, 1907, and is entitled “An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.” Chapter 2939, 34 Stat. 1415. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working over time. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is

that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employe to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

The same rules have been recognized and applied by state courts in actions arising under state Employer's Liability Acts which were more or less similar to the Federal Employer's Liability Act. It is uniformly held that not only must negligence be proven as before the adoption of the acts, but that the proven negligence must be shown to have been the proximate cause of the injury complained of.

Walton vs. Railway Company, 52 So., 328.

Scroggins vs. Cement Company, 60 So., 175.

Railway Company vs. Tompkins, 70 S. E., 955.

Johnson vs. Railway Company, 58 So., 447.

Speaking of employer's liability acts, Mr. Labatt says:

“By Section 2, subs. 2, of the English act, and the corresponding provisions of the colonial acts, it is expressly declared that the workmen shall not be entitled to compensation “unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions.” This proviso is not inserted in the American statutes; but it is clear, both on principle and authority, that this non-insertion cannot be construed as having the effect of overruling the general rule that proof of negligence in respect to the subject matter is a condition precedent to recovery in actions against the employer. The intention of the legislatures is assumed to be that no liability can be predicated, unless the defendant is shown to have been culpable either in promulgating the rule in question, or in failing to promulgate a rule to meet the requirements of the case.”

5 Labatt's Master & Servant, §1701.

Upon the foregoing authorities we submit that the jury's finding that the proximate cause of the collision was plaintiff's violation of his orders, rendered utterly immaterial their finding that the brakes on plaintiff's train were insufficient to control its speed immediately before the collision, and that as the doctrine of proximate cause remains unaffected by the Employer's Liability Act, there can be no recovery because it has been estab-

lished by such finding that there was no negligence on the defendant's part which, under the well established rule of proximate cause, was responsible for the accident.

(c) Considered together, it is patent that the pleadings, evidence, and finding with respect to the brakes on plaintiff's train make out no case of actionable negligence against defendant by reason of the failure of the brakes to work, judged by common law rules. The complaint merely alleges that in a moment of emergency the brakes failed to work, because they were defective. No defect is specified, nor is it alleged that defendant knew, or ought to have known, of the alleged defective condition. The evidence showed clearly that the only way in which defendant could be convicted of negligence with respect to the failure of the brakes to work, was to hold it liable as an insurer that the brakes should work under all conditions and circumstances. The finding merely is that the brakes were insufficient to control the speed of the train immediately before the collision.

The theory upon which this finding was permitted to neutralize and destroy the effect of the findings that plaintiff's disobedience of his orders

was the proximate cause of the injury, was that the Federal Safety Appliance Act is applicable to such cars as plaintiff was operating; that such act, in effect, made the defendant an insurer that the brakes would work at all times and under any conditions, and that mere failure of the brakes to operate perfectly at the moment of collision constituted proof of actionable negligence against defendant. That theory, we contend, is unsound fundamentally because of the fact (*inter alia*) that the Safety Appliance Act is not applicable to such cars as the plaintiff was operating. If it is not, then the duty of absolute insurance which it is supposed to cast upon defendant is inapplicable, and since the finding, considered in the light of the whole record, clearly does not show actionable negligence unless the Safety Appliance Act is applicable, the finding with respect to the brakes is immaterial.

There is no dispute in the evidence as to the nature of the cars which plaintiff was operating. The motor car, so the witnesses all say, was divided into three compartments, a small compartment in which the motorman sat and where were the controller by which the electric power was turned on and off, the brake valve by which the air brakes were controlled, and the air brake

gauge. A door from this compartment led into another compartment about eight feet square in which baggage was sometimes carried, and another door led from this compartment into the third compartment into which the car was divided, where passengers were carried. The trailers were ordinary cars attached to the motor and pulled by it. The cars were small and light, plaintiff's witness Dixon saying they were about half the weight of ordinary coaches. They were, of course, operated by electricity, the movement of the train being under the control of plaintiff as motorman.

Turning to the Safety Appliance Act, it is manifest that the act, in so far as the equipment of trains with air brakes is concerned, does not apply to electrically operated roads such as defendant's.

While the provisions with respect to automatic couplers, grab-irons, draw-bars, etc., are sufficiently broad to embrace all sorts of vehicles used in interstate commerce, no matter what the propulsive power, the provision requiring air brakes was plainly intended to apply only to steam railroads. The title of the act is:

“An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their loco-

motives with driving-wheel brakes, and for other purposes.”

The first section of the act, that which relates to air brake equipment, is as follows:

“That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.”

The sixth section of the act provides “That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of the act” shall be liable to the penalty provided. The proviso of this section excepts from the operation of the act certain types of cars and trains, and “locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.” The eighth section of the act provides that any employe of the carriers affected who may be injured “by any locomotive, car, or train in

use contrary to the provisions of the act" shall not be held to have assumed the risk of so continuing in the employment with notice of the use "of such locomotive, car, or train."

The word "locomotive," as well as the word "engine" has a well understood meaning. No individual of average attainments would doubt as to what was meant where either of those words were used. "Engine," in itself, implies an engine driven by steam power, for so has the word been used ever since steam power was known. So the word "locomotive" means a steam engine drawing a train of cars. When the two words are combined, as they are in places in this act, and a "locomotive engine" is spoken of, it would be doing violence to the universally accepted meaning to construe the words to embrace within their meaning an electrically propelled motor-car carrying passengers; in effect, the ordinary street railway car of the city run on a suburban road. So the word "engineer" has a well understood and universally accepted meaning. It is used only with respect to the operator of a steam engine, and one may hardly say what one would think of the understanding of a person who would have difficulty in understanding what was meant by the words "engineer on the locomotive." It is too

palpable for discussion that those words apply only to steam-driven engines, locomotives employed to draw trains. And if the words of the act did not speak loudly enough in themselves as to their meaning, no doubt can remain when it is remembered that when this act was adopted, in 1893, electricity as a propulsive power was in its infancy, and where used it was only in an experimental way on a few street-car lines, and that there was nowhere in the United States any carrier engaged in interstate business using electricity as a propulsive power.

Turning from the knowledge and language of the man on the street to the technical understanding and language of railroad men, it will be seen that there as well is the distinction preserved between the steam propelled locomotive and the engineer in charge of it and the electrically driven motor-car carrying passengers and the motorman controlling it. In all the rules of the company which we introduced in evidence there was a careful distinction between "motormen" and "engineers and enginemen."

The air brake rules which were introduced in evidence all the way through speak of "motormen or enginemen." In every rule where the operator controlling the air is referred to, the distinction

is preserved. The words are invariably used "enginemen or motormen." The form of order admitted in evidence had printed upon it "Conductor, motorman, engineer, and brakeman must each have a copy of this order." In the space above the place reserved for the signature of the driver of the train to the order appear the words "motorman or engineer." Sub-division "G" of Rule 165, which was admitted in evidence, reads:

"Responsibility for protection of a train rests with the conductor and motorman or engineer, and they must know that their brakemen, flagmen, and fireman are conversant with and fully understand the application of all rules relating to the protection of trains, and comply therewith."

Obviously, then, whether in technical language or lay speech, a locomotive engine and a motor are two distinct and entirely dissimilar things, and an engineer or engineman and a motorman are two quite distinct personalities.

So far as we can ascertain, there has never been any decision construing the Federal Safety Appliance Act and holding that so far as the prescription of the duty to supply air brakes is concerned it relates to steam propelled trains. There are many decisions in the state courts, however, construing equivalent state statutes, which sustain the point we make.

Thus a state statute providing that the engineer or other person having control of the running of a locomotive on any railroad shall blow the whistle or ring the bell in certain situations does not apply to interurban railroads operated by electricity.

Birmingham etc. Co. v. Ozburn (Ala.), 56 So., 599.

In the course of the opinion so holding, the court said:

“That statute made provision for duties to be performed in the specific case of ‘the engineer, or other person having control of the running of a locomotive on any railroad.’ At the date of the original enactment electricity was not in use as a motive power on railroads, and common usage had adopted the word ‘locomotive’ to designate a steam engine designed and adapted to travel on a railroad. The word still retains that meaning. Century Dictionary. In common usage it is not understood to describe or include an electric street car. To give that import to the word as used in that statute would amount to imputing to the statute a meaning which it does not express.”

In holding that the language of an act conferring jurisdiction on a state commission to deal with railroad crossings did not apply to the crossing of a steam railroad by an electric railway line, it was said:

“It will not be contended that the use of the words ‘engines and trains’ have application to electric street railroads, the cars of which

are not operated by engines nor drawn in trains; and it must be held that the statute was enacted with reference to the crossing of one steam or commercial railroad over another, and not to the crossing of such a railroad of the track of a street railroad; otherwise, in view of the provision of the section of the railway commission law, above quoted, language would have been employed to remove all doubt as to the legislative intention in that regard."

Galveston etc. Co. v. Railway Co., 123 S. W., 1140.

A state statute relating to liability for injuries caused by the negligence of any person having charge of a "locomotive engine or train upon a railroad" does not apply to employes operating electric interurban cars.

"Moreover, we must assume that when the Legislature passed the employers' liability act of March 4, 1893, it was dealing with and acting upon existing facts within its knowledge. The mischief felt and intended to be remedied was then certainly known. It cannot be assumed that the statute was passed before there was an apparent necessity for its enactment. When that act was passed, aside from street railroads in cities, steam railroads were the only railroads in operation generally, and the dangers arising from the operation of railroads were to a very large extent only such dangers as arose from the operation of steam railroads. At that time there were few, if any, electric roads, as now known, in existence in this state. The reasons for changing the law relating to master and servant, as that act changed it, were at that time to be found in the many

dangers to which the numerous persons engaged in operating steam railroads were exposed, and the many different departments of labor in which the workmen were employed. It is quite true that an electric railroad, as we now know such roads, might be called a railroad; but, as said in *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 17 L. Ed. 571: 'It does not follow that when a newly invented or discovered thing is called by some familiar word which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar words.' "

Indianapolis etc. Co. v. Andis, 72 N. E., 145.

Construing similar language, it was held by the Supreme Court of Massachusetts that it did not apply to a street car.

Fallon v. Ry. Co., 50 N. E., 536.

Similarly construing the employers' liability act of New Jersey, the supreme court of that state said:

"We can give to the words 'locomotive engine' or 'train upon a railway,' as employed in this act, the construction contended for by the demurrant, so as to apply it to street railways, only by indulging in a liberality of construction and interpretation radically divergent from the accepted use of the words in popular and colloquial phrase and totally opposed, as has been seen, to the hitherto legislative and judicial acceptation of the terms. The collocation of these terms, 'signal, switch, locomotive engine or train upon a railroad' affords some aid in enabling us to determine the legisla-

tive intent by according to them, as we must under the familiar canons of construction, their ordinary and common meaning in the absence of a legislative intent to the contrary, and a similar result is reached by the application of the maxim of construction. '*Noscitur a sociis.*' Black, Int. Laws, 135; Bacon's Ab. 4, p. 26; Bishop v. Elliott, 11 Exch. 113. The plain inference from this collocation is that the Legislature in enacting the legislation in question had in mind that public policy of differentiation between two distinct systems of railroads which has consistently marked the legislation upon the subject, and which has been repeatedly recognized by judicial determination as the declared public policy of the state."

Conover v. Ry. Co., 78 At., 187.

Holding that a statute requiring locomotive engineers to give signals when approaching public crossings applied to a steam driven inspection car, this language was used:

"Besides it was, by strict definition, a locomotive engine, being a vehicle moved by a steam engine and designed to run over the track of a railroad from place to place. *Jarvis v. Hitch* (Ind. App.), 65 N. E., 608; *Fallon v. Railroad*, 171 Mass., 249, 50 N. E., 536; *Stranahan v. Railroad*, 84 N. Y., 308; Webster's Int. Dict. (1910 Ed.), p. 1267, word 'Locomotive.' It is true the name 'locomotive engine' is usually understood to signify a steam engine used to draw a car or train of cars along a railroad track (*Murphy v. Wilson*, 62 L. J. Q. B. 534), and the engine in question drew neither, but, being in the middle of the car, propelled it along the track. This un-

likeness to an ordinary locomotive should not be held to constitute it an engine of another sort than a locomotive engine within the meaning of the municipal ordinance or the statute."

Mudd v. Ry. Co., 124 S. W., 59.

Similar decisions are:

Norfolk etc. Co. v. Ellington, 61 S. E., 779.

Cleveland etc. Co. v. Somers, 24 Ohio Cir. Ct. Rep., 67.

The word "engineer" has also been construed. In an early case it was contended that rules entitled "general orders to engineers" and containing among other provisions the prescription that no person should be allowed to ride on the engine without permission of the engineer, meant civil engineer, and did not refer to the engine driver or person in charge of a locomotive. Said the court:

"Throughout the United States this word 'engineer,' when used in connection with railroads, is invariably employed to designate the party in charge of the locomotive. In scores of opinions in the reports of the decisions of the courts of the various states, this word is so employed; and by Worcester and Webster, an 'engineer' is defined as 'one who manages an engine' an 'engine man,' 'an engineer.'"

29 *Federal Cases*, 1033.

In his opinion denying the petition for a new trial, the trial judge said that "the original safety appliance act of 1893 applied only to locomotive

engines and engineers on locomotives drawing interstate trains, and these terms are doubtless not broad enough to include electric motors and motor-men." He was of opinion, however, that by the amendment of 1903 the operation of the act was extended and made sufficiently broad to include electric cars running upon suburban roads because of the use of the words "and similar vehicles" in the amendment.

In giving such considerable effect to the amendatory act, we believe the trial judge fell into error. It is a fundamental principle that in the interpretation of a statute common or popular words are to be understood in a popular sense, and should be construed with reference to their generally accepted meaning at the time of the passage of the act, and if used in re-enactments will be deemed to be used in their original sense.

"Primarily—that is, in the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense; common-law words according to their sense in the common law; and technical words, pertaining to any science, art or trade, in a technical sense. It is a familiar rule of construction, alike dictated by authority and common sense, that common words are to be extended to all the objects which, in their usual acceptance, they describe or denote; and that technical terms are to be allowed their technical meaning and effect, unless in either case

the context indicates that such construction would frustrate the real intention of the maker. They should be construed according to the intent of the legislature which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the legislature. The court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the act prove to have been the existing circumstances at the time of its preparation. They should be construed with reference to their generally accepted meaning at the time of the passage of the act, and if re-enacted will be deemed to be adopted in their original sense."

Sutherland, Statutory Construction, §247.

"Again, it is laid down as an elementary principle in the construction of statutes that the common usage of words at the time of the enactment is a true criterion by which to determine their meaning. Smith, St. & Const. Law, §483. The reason of this rule is that what was in the minds of the framers of the law at the time of its enactment, their thoughts, their specific intent, on the subject, must be sought out and given effect, in order to give to the law correct judicial interpretation. Applying the foregoing, there were, at the time of the enactment of the law in question, and had been for a long period of years theretofore, and have been subsequently, in railroad service everywhere in this country, as a matter of common knowledge, officers known as 'superintendents' in the operating department of the road; general superintendents of

the whole line, and superintendents of divisions. The general duties of such superintendents are intimately connected with the movement of trains and cars. Now, it must be presumed that the legislature used the word as it was commonly used. They had in mind the officers of railroads to whom the term was generally applied. The position of superintendent in the railway service is as definitely and well known as that of train dispatcher, telegraph operator, conductor, or engineer. It could not be sincerely claimed that the word 'conductor' can be applied to the foreman of a section gang or of a bridge crew, because he merely conducts or manages the work; or that it can be applied to any other conductor than the one who manages the railroad train; and yet the act does not say 'train conductor.' It could not be sincerely claimed that the word 'engineer' can be applied to the engineer who locates tracks and does engineering work of that kind, or who runs some little stationary pumping engine, or to any one of many other persons connected with railroad service that might properly be called 'engineers'; and yet the act does not say 'locomotive engineer.' And the same illustration might be given in respect to each of the persons specifically named in the act. It may thus be clearly seen that to apply the word 'superintendent' to the mere foreman of a repair shop would be entirely inconsistent with the obvious purpose of the act."

Hartford v. Railway Co., 64 N. W., 1033.

The original act, it seems clear, used the words "locomotive engine" and "engineer on the locomotive" in the sense in which any and every body

used and understood them at the time of the enactment. Now the original act was limited in its scope. It applied only to engines and cars used "in moving interstate traffic." The amendatory act made it applicable "to common carriers by railroads in Territories and the District of Columbia," and extended the provisions and requirements of the act relating to train brakes, automatic couplers, grab-irons and the height of draw-bars so as "to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." The intent of Congress in this amendment, it is plain, was, first, to extend the application of the act to railroads operating in the territories and the District of Columbia, and, second, to make it applicable not only to such locomotives, cars, etc., as were used in the movement of interstate traffic, but also to such as were "used in connection therewith." If Congress had had in mind the growing importance of electricity as a propulsive power, and the fact that the use of that power was being so extended as to make it a medium for the transportation of interstate commerce and intended to so extend the act as to embrace rail-

roads and trains operated and moved thereby, it would have used explicit language in so extending it, and not left its meaning so equivocal.

It has been said of the amendatory act that it "is affirmative and declaratory, and in effect only construed and applied the former act."

Johnson v. Ry. Co., 196 U. S., 21.

Furthermore, any effect as an extension of the language of the original act to cover motor cars and motormen by the use of the words "similar vehicles" in section one of the amendatory act is destroyed by section two of such act, which, dealing specifically with the subject of air brake equipment, provides:

"That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate-Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate-Commerce Commission shall be subject to the like penalty

as failure to comply with any requirement of this section.”

Here we have specific reference to the original act and its provisions, and again the use of the words “locomotive” and “engineer,” and under the authorities cited above this negatives the construction placed upon the amendatory act by the trial judge. Even more convincing against such construction is the language employed by the Interstate Commerce Commission in the order increasing the minimum percentage of cars in a train required to be equipped with power brakes, made in pursuance of its authorization in that behalf by the second section of the amendatory act. This order is that when any train is operated with power or train brakes, not less than eighty-five per cent of the cars of such train shall have their brakes operated “by the engineer of the locomotive drawing such train.” If any tribunal is better fitted than another to construe the language of an act intended for the protection of employes and the public, the body which for years had been studying the needs of the situation, and was by law charged with the enforcement of the act, should be deemed to be superior. If in the practical operation of railroads there had been any crying need that suburban trains electrically operated should be equipped with

power brakes, the Interstate Commerce Commission would have been cognizant of it, and in making its order would have made it broad enough to cover all vehicles used in moving interstate commerce, or used in connection therewith, no matter what their character. The language of the order referred to adopts the words of the original act and the amendatory act, and in all the language is applicable only to steam railroads and trains drawn by locomotives.

We have heretofore remarked that the provisions of the sections of the Safety Appliance Act relating to the equipment of cars with draw-bars of standard height, automatic couplers, grab-irons, etc., was broad enough to apply to all cars on all railroads engaged in interstate traffic, while the language of the section relating to power brakes is more restricted. It might seem at first blush that there was such an inconsistency here as would require that the intent should be ascribed to Congress to make the provision with respect to air brakes as applicable to all means of moving interstate commerce as are the provisions with respect to the other safety appliances. In fact there is no inconsistency in making the provisions with respect to one safety appliance less broad than others. Though there be but two or three cars in

a train, there is as great danger to men who are required to couple them together if the draw-bars are not of standard height, or they are not equipped with automatic couplers, or there are no grab-irons upon them, as there would be in trains of forty or fifty cars, so it is but proper that the provisions with respect to such safety appliances should be made to embrace every vehicle which may be coupled to another. Very different is the case with respect to the need of power brakes. Steam railroads move their passenger trains great distances at a high rate of speed, and with heavy cars, particularly the sleeping cars which make up so large a part of their equipment. Obviously hand brakes would be utterly inadequate to control such trains. The inadequacy of hand brakes is equally patent with respect to the freight trains of such roads. It is well known that there has been a steady increase during the last ten or fifteen years in the size and power of freight locomotives, and with it a consequent increase in the length and weight of freight trains drawn by them. No such conditions exist with respect to the ordinary suburban or interurban electric road. The cars run upon them are little more than street cars. Plaintiff's witness Dixon, speaking of the cars which made up the plaintiff's train, said that they were small,

about half the size of ordinary coaches. The three cars packed full of people, standing in the aisles, on the platforms, and filling the baggage compartment, carried only about three hundred persons. On such roads, the trains consist of a motor-car operated singly and carrying passengers, or with a trailer, or sometimes two, attached, as the needs of the traffic require. No high rate of speed is attained, twenty to thirty miles an hour being the limit of speed. Frequent stops are made on the ordinary suburban road, the stopping places being from a half a mile to a mile and a half apart. Such cars and trains may readily be controlled by the use of hand brakes. Of course, as a matter of convenience and ease of operation, all such cars and trains are equipped with power brakes, just as all up-to-date street cars are so equipped. There is, however, no need, so far as the safety of employes and passengers is concerned, that such cars should be so equipped, and it was only in response to an urgent demand for such appliances as should secure safety that Congress acted and authorized the Interstate Commerce Commission to act. In the light of these considerations, the very clear language used by both Congress and the Interstate Commerce Commission, limiting the operation of the act, so far as relates to power

brakes, to steam railroads and the locomotives and trains moved thereover, is explainable.

Reading the original act, the amendatory act, and the order of the Interstate Commerce Commission together, it is clear; first, that when the original act was adopted there was no intent to make its provisions applicable to other than steam railroads and steam locomotives and steam drawn cars moving thereover, because none other was known at that time; and, second, that when the act was amended in 1903 Congress had no thought of legislating upon the specific subject of suburban or interurban roads electrically operated; and, third, that when the Interstate Commerce Commission, in June, 1910, made its order with respect to power brakes it saw no necessity for making the original act comprehensive enough to include such roads although their existence was by that time a well known fact and must have been particularly so to such a body as the Interstate Commerce Commission.

II.

Error in Denying the Petition for a New Trial.

Should the court refuse to consider the merits of the motion for judgment *non obstante* because it is of opinion there is no necessary inconsistency

between the general verdict and the findings, viewed in the light of the pleadings and findings alone, and that it cannot look beyond them to ascertain the scope and meaning of the findings, the reasons which have been urged in support of that motion are quite as applicable in support of the claim of error in denying the petition for a new trial, and we ask that they should be considered in that behalf. If, as we have urged, the plaintiff was acting without the scope of his employment when injured, and the defendant owed him no greater duty than it did any trespasser upon its tracks, or his injury was proximately caused by his violation of law and of his orders, and he can base no claim upon his wrong, or if his motor-car and trailers were not within the scope of the section of the Safety Appliance Act providing for power brake equipment, there was certainly error in denying the new trial. Of course, if the court considers that there was conflict in the special findings and the general verdict because of these things, then defendant was entitled to the granting of its motion for judgment, and it is only in the event of the court so restricting the field of its observation as to be unable to discover inconsistency between the special findings and the general verdict that we ask the court to consider such reasons as ground for a new trial.

In addition to such reasons, we urge that a new trial should be granted because the trial judge erred in submitting to the jury the question of whether the brakes were defective, and in refusing to give defendant's requested instructions to the effect that if the jury should find that plaintiff left Coeur d'Alene in violation of his orders, their verdict must be for the defendant. The basis for this insistence is there is no evidence of any defects in the brakes for which defendant can be held liable.

The consideration of this additional reason requires a somewhat more comprehensive view of the evidence than has heretofore been necessary.

Plaintiff's train was fully equipped with the standard Westinghouse automatic air brake, such as is in use on the passenger equipment of all the railroads in the United States and Canada (Record, pp. ¹⁰³₁₀₄). Prior to the beginning of the land registration at Coeur d'Alene, the air brake equipment on the cars that were used between Spokane and Coeur d'Alene was thoroughly gone over, and all the equipment put in perfect condition (Record, pp. 101.). At the time of the accident, there was in effect a rule of the company with which plaintiff was familiar and which provides:

“Conductors and Motormen or Enginemen will give air brakes personal attention and exact similar care from Brakemen, and will not start a train from a terminal, or from any point after switching has been done, cars set out or picked up, engines or motors changed, or where for any reason train pipe has been disconnected, until after a test of air by Car Inspectors or by Train and Enginemen or Motormen.”

(Record, pp. 162...)

Plaintiff testified that Coeur d’Alene was a terminal, but that he did not personally test his air there because “there were men in Coeur d’Alene for that purpose.” He says that he does not know whether the inspectors at Coeur d’Alene tested the air on his train while he was waiting to start on his disastrous trip, but the witness Moffitt, the air inspector at Coeur d’Alene, testifies that he personally made such an inspection of the train, describing in detail what he did and saying that it was the regular terminal inspection. He found no defects whatever in the braking system of the train (Record, pp. 161...). Plaintiff himself testifies that he tested the air in Spokane on the morning of July 31st before taking the train out on its first trip because “it was my duty to do that”; that no changes were made in the make-up of the train during the day; that the brakes worked perfectly all during the day; that in going

into Coeur d'Alene, turning his train on the wye, and bringing it into position to start on the return trip to Spokane, they worked perfectly; that when he saw No. 20 and dynamited his train the brakes "caught hold and was making a stop very nicely when all of a sudden it released" (Record, pp. $\frac{50}{59}$). He made no claim of structural deficiencies in the brake, and suggested no defects which he believed affected them. He guessed at a number of things which might have caused the brakes to release, as he testified they did. He said:

"One cause might be a piece of dirt in the triple valves. The triple valves are a part of the air appliance; some of them are underneath the cars and some of them are in the cars. There are several other things, such as dirty valves in connection with the cylinders. They are so numerous that I cannot name them. I am not so conversant now with air as I was at that time. Those two causes are the only ones I can think of at the present time, dirt getting into the triple valves, or the triple valves getting dirty; or rust or water will sometimes do it."

Then he said:

"If there was any dirt got into the triple valves it was not necessarily between Coeur d'Alene and the point where I saw No. 20. It might have been in there all the time. It was the first time that the valve had been used in that position for some length of time. It is not very often that a motorman has

occasion to use his emergency brakes to slow her, to put that kind of a strain. He is not supposed to test his air in all positions in the yards. It is very impractical for a man in any service, any emergency appliances. When a train is standing still and I am testing the air from my cab, I can test it in all positions. I don't know whether the brakes broke in two when I applied them or not, they could do it. If there was an air connection brake in the train line, they might break from putting them on too hard. Possibly it would break the brake-beam, or something like that. It would not release the air unless you broke the cylinder; that would release it. If you did not apply your emergency properly that might have happened. I don't know what did happen, and I don't think anybody else does either" (Record, pp. 64...).

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No other testimony offered by plaintiff tended to fix the cause for the releasing of the air brakes after having taken hold, as he claims they did. Mr. Robinson, the mechanical expert for the Westinghouse Air Brake Company, who testified for defendant, said that if a train were running and the motorman applied his emergency brakes and the brakes took hold, there were but two things which would cause them to release.

"It might happen if the pipe—if for any reason the pipe between the auxiliary reservoir and the pipe on each coach were broken. In that event the storage reservoir would be vented automatically and would not be available. The other means by which they would

not hold is by the engineer accidentally pulling the handle of the brake valve into release position, not intentionally, but accidentally. If he did that, of course, the brakes would release because the valve is there for that purpose, to enable the motorman to release the brakes.

Q. Those are the only two things that could do it?

A. And there is another thing that could do it and that is—I said breaking the pipe between the auxiliary and the brake cylinder, breaking the cylinder itself or breaking the reservoir, would have the same effect, of course” (Record, pp. 106.).

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And again:

“Q. Mr. Robinson, I want to state a hypothetical question and ask you if it would be possible to occur except from the happening of the things you have stated: Suppose a train of three cars, a motor and two trailers equipped as the one you saw, No. 4, starting operating at six-thirty in the morning from Spokane, going to Coeur d’Alene from Spokane and returning to Spokane, going to Coeur d’Alene from Spokane and returning to Spokane, a distance of approximately thirty miles, then going from Spokane to Coeur d’Alene, there being inspected and found all right, assuming that the brakes were working perfectly on two trips and a half, and that the train left the station at Coeur d’Alene, traveled about a mile and a half at a rate of approximately thirty miles an hour, twenty-five or thirty miles an hour, would it be possible under those conditions, the brakes working perfectly all this time, would it be possible under those conditions, if it were thrown

into an emergency, for the emergency to hold thirty or forty feet, and then release entirely and let the train shoot ahead for a distance of six hundred feet the same as though the brakes had not been put on?

A. Not unless, as I stated before, the pipe connections under the car that I specified, were broken.

Q. The pipe connections under the car?

A. Under each car; yes, sir.

Q. They would all have to break at once, wouldn't they?

A. Yes, sir. If the one on the head car broke and the other two did not, the brakes on the other two cars would stop the train.

Q. Did you ever hear of a thing happening, and all of these pipes under each car breaking at once?

A. No, sir, I never did.

Q. Would it be practically possible for that to happen?

A. No, sir."

Record, 111

Under the law of negligence familiar to every lawyer, it is needless to say that there is not in such evidence sufficient to make a *prima facie* case for the jury. It is only by holding that the law of negligence has been so changed by some Federal act governing the liability of interstate carriers for injuries to their employes that either (1) proof of the mere failure of the brakes to work made a *prima facie* case of negligence, *i. e.*,

res ipsa loquitur, or (2) that such carriers are insurers that the air brakes used by them will never give way or fail to work perfectly under any stress, that it may be said there was here any evidence of negligence.

The cause of action set out in the complaint was based upon both the Employers' Liability and the Safety Appliance Acts, for it charged negligence in the giving of improper orders and in the furnishing of defective air brakes. The jury's findings have eliminated the question of improper orders from the case, and plaintiff's recovery, if recover he may, must be based upon the insufficiency of the brakes. The evidence with respect thereto does not make out a case of actionable negligence under common law rules. Does it under either Federal act, and if so, which?

First of the Safety Appliance Act. That act, the first of the Federal statutes enacted for the protection of travelers upon and employes of railroads, is purely an act relating to degree of care. It imposes upon interstate railroads the duty to equip their locomotives and trains with power brakes, and their cars with automatic couplers, grab irons, and draw-bars of uniform height. The Supreme Court has held that the duties imposed by the act are absolute, and that a failure to dis-

charge them cannot be excused by a showing of reasonable diligence in an effort to discharge them. In addition to imposing the duties referred to, the act provides that employes shall not be deemed to have assumed the risks arising from the failure of a railroad company to equip its locomotives, cars and trains as required therein. Apart from those matters, the act makes no change in the law of negligence as applied to the relation of master and servant. The act, consequently, did not affect the defense of contributory negligence.

Schlemmer v. Railway Co., 220 U. S., 590.

Such being the Safety Appliance Act, its imposition of duty to furnish air brakes, however absolute in terms it may be said to be, cannot be relied upon to eke out plaintiff's insufficient evidence that the brakes on his train were defective. If plaintiff plants himself upon that act, and claims that under its provisions his evidence is sufficient because it has imposed an absolute duty to furnish brakes that will work perfectly at all times and under all conditions, he must take such of its provisions as are to his detriment with those which benefit him. He cannot take what he chooses of the act and discard the remainder. The jury have found that plaintiff left Coeur d'Alene in violation of his orders, and that the proximate

cause of his injury was that wrongful act. Whether this finding be considered as going to the cause of action, and establishing that plaintiff had none because when injured he was without the scope of his employment, or because his own wrong was the proximate cause of his injury, or whether it be considered as establishing a defense by fixing plaintiff's negligence as the proximate cause of his injury, is immaterial. The Safety Appliance Act affects none of those principles, and if plaintiff bases his action upon its provisions and claims its benefits, he must take them subject to all the defenses which that act permits to the causes of action which it gives.

There remains the Employers' Liability Act. It differs radically in character from the Safety Appliance Act. That act dealt exclusively with causes of action, prescribing duties and making breaches of them actionable. It trenched upon defenses to the causes of action it gave only to the extent of doing away with assumed risk. The Liability Act, on the contrary, deals solely with defenses, abolishing the defense that the negligence complained of was the negligence of a fellow servant; abolishing the defense that the plaintiff's negligence contributed to his injury; and greatly limiting the defense of assumed risk. But it

changed no rule respecting what must exist in order that there may be a cause of action. Railroad companies were not made insurers of their employes' safety. Mere injury, or damage resulting from mere accident, does not make a cause of action. Section one of the act provides that the carriers affected shall be liable in damages for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employers" of such carriers. It is liable, also, where injury occurs "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances," etc. It makes no provision with respect to evidence, practice or procedure. Mode of proof and burden of proof are not touched upon, wherein it differs from many state liability acts, in most of which it is provided that evidence of the mere failure of an appliance, or in some of the more extreme, mere proof of injury while in the course of an employment, shall be *prima facie* evidence of negligence. Negligence gives a cause of action under the act as it did before its enactment, but what is negligence and how it shall be proved is not determined. By the abolition or restriction of defenses alone does the Liability Act accomplish its remedial purposes.

Such being the nature and scope of the act, cita-

tion of authorities hardly seems necessary to the proposition that the negligence referred to in the statute as cause for action is negligence as it was defined by the existing law, and, further, that it must be proven in accordance with the requirements of the existing law.

“In all doubtful matters, and when the statute is in general terms, it is subject to the principles of the common law; it is to receive such a construction as is agreeable to that law in cases of the same nature. A statute in affirmance of a rule of the common law will be construed, as to its consequences, in accordance with such law. So provisions which are intended to remedy defects in the common law must be read and construed in the light of that law. When words of definite signification therein are used in such provisions, and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined common-law meaning.”

Sutherland, Statutory Construction, §291.

But if it is thought necessary, there is abundant material for citation:

“A statute which simply imposes a new obligation upon an employer, or renders him liable for the negligence of an employe who would, apart from its provisions, have been regarded as a mere co-servant of the injured person, leaves upon the plaintiff the burden of proving the existence of such culpability as will entitle him to maintain the action.”

4 *Labatt, Master & Servant* (2d Ed.), p. 4902.

The cases cited under subdivision (b) of the preceding head all declare the necessity of proving negligence in order to make out a case under the act. Characteristic phrases are:

“The question of negligence and of proximate cause are still to be determined according to the general existing rules on that subject”; “under the federal statute the plaintiff must show negligence under the rules ordinarily applicable to cases of that character”; “substantial evidence of the facts which constitute the cause of action in this case of the alleged defect * * * is indispensable to the maintenance of a verdict sustaining it”; “no recovery can be had unless the evidence warrants a verdict that the hostler’s negligence was a proximate cause of the accident.” And the Supreme Court said in the *McWhirter* case that “It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage,” and that where no rule of absolute liability arising from the violation of a statute “is expressed in the statute it cannot be supplied by implication.”

It may be argued here as it was in the trial court that the plaintiff may pick and choose from the

two acts in order to make up a statute which will sustain the action; that he may take from the Safety Appliance Act the absolute duty to furnish sufficient air brakes which it prescribes, and from the Liability Act the provision abolishing the defense of contributory negligence, and thus piece out a statute which will make a cause of action for him by giving effect to the finding of the jury with respect to air brakes and refusing effect to the finding that his own wrong was the proximate cause of the injury.

A pretty theory, but not tenable. The two acts are entirely distinct, deal with different subjects, and the last section of the later, the Liability Act, expressly declares that it shall not limit or impair rights given by any former act. And obviously a litigant may not claim the benefit of such provisions of two separate acts as are necessary to make out a cause of action for him and disregard other provisions of the two acts which would be fatal.

“We are clearly of the opinion that the plaintiff’s contention is right; that the action was one purely at common law, and for this reason, and because, upon the question of assumption of risks, the plaintiff was permitted to go to the jury, under the provisions of the employers’ liability act, where at common law he had failed to make a case

entitling him to such submission, we are of opinion that the judgment and order appealed from should be reversed. There is no such thing as a blending of a common-law action for negligence resulting in personal injuries and an action under the employers' liability act; portions of a common-law action cannot be pieced out with the provisions of the employers' liability act and produce a good and valid judgment, and that is exactly what has been attempted here. It is true that both a common-law action and an action under the employers' liability act may be pleaded, and it may be that in the absence of a demand for an election the plaintiff is not obliged to say on which cause of action he is proceeding; but we believe no case has yet held that a common-law action, pleaded and tried as such, is entitled to the benefits of the special rules laid down for controlling actions under the employers' liability act. Such an intimation was made in *Ward v. Manhattan Railway Co.*, 95 App. Div. 437, 88 N. Y. Supp. 758, but subsequently, and in the case of *Curran v. Manhattan Railway Co.*, 118 App. Div. 347, 349, 103 N. Y. Supp. 351, the same court distinctly rejects the suggestion and says that:

'Further consideration has led us to conclude that, in order to entitle an employe to the benefit of the provisions of the employers' liability act, he must bring his action under that act and conform to its terms in so doing (*Chisholm v. Manhattan Railway Co.*, 116 App. Div. 320, 101 N. Y. Supp. 622), and that, in an action for common-law negligence, he is not entitled to the benefits of its provisions, but must be governed by the rules of the common law.'"

Welch v. Waterbury, 120 N. Y. Supp., 1060.

We submit, therefore, that plaintiff may not rely upon any supposedly different rule of evidence as to what is negligence which it may be considered is prescribed by the Safety Appliance Act, for he must take the benefits of that act *cum onere*. If he asserts that under the provisions of that act the mere failure of air brakes to work, though under extraordinary conditions, makes out a *prima facie* case of negligence, and claims the benefit of that statutorily established rule, then he must accept the remainder of the act so far as it is applicable to his case, even though it permits a defense which clearly defeats his cause of action. He has no right to complain of a statute which is so liberal in its provisions as to permit him to make a case by evidence which would otherwise not be sufficient for that purpose, because it permits a defense which another statute, less liberal in its provisions with respect to what is necessary to establish a cause of action, has abrogated. Neither has he cause for complaint that the other statute, to which he must resort to escape a defense, has not been generous enough to do away with the necessity for producing evidence of negligence in order to make out a cause of action.

We have so far argued the question of the insufficiency of the evidence to establish deficiencies

in the air brakes as though the Safety Appliance Act changed the rules of evidence, so that if plaintiff were at liberty to rely upon that act, his testimony that the brakes failed to hold would be evidence that they were defective. But we do not think that is true.

The Safety Appliance Act deals solely with the duties of railway companies. It prescribes certain appliances with which they must equip their trains. The duty so prescribed is, of course, an absolute one, and upon proof of their failure to discharge it, they may not escape the penalty by confession and avoidance; by showing that they used reasonable care in an endeavor to equip their trains as the statute requires and to keep them so equipped. But the statute has nothing to say of the rules of evidence. It prescribes the duty, but makes no provision as to what shall be evidence of its breach. It is common in such statutes to make evidence of an injury *prima facie* evidence of an actionable breach of duty (*vide* cases referred to in 5 *Labatt, Master & Servant*, pp. 4901-4904), and because it is common the failure of the statute in question to make such provision is significant. It seems clear, therefore, that while, a breach of the statutory duty established, a railway company may not excuse it, that yet it may demand that its

breach of duty be established by competent and sufficient evidence before it may be called upon to respond therefor.

Now, was the failure of the brakes to hold, used as the evidence shows them to have been used by plaintiff at the moment of the collision, competent and sufficient evidence that they were defective even under the rule of absolute duty prescribed by the Safety Appliance Act? Clearly not, unless *res ipsa loquitur*. The rule expressed in those words is a rule of evidence.

“In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.”

Sweeney v. Erving, 228 U. S., 240.

And see:

Duntley v. Inman, 70 Pac., 530.

Edgens v. Mfg. Co., 48 S. E., 538.

The Safety Appliance Act, as we have before remarked, does not purport to deal with rules of evidence. It prescribes duties, and leaves the mode of proof of breach of such duties to be determined by the existing law. In the existing law, the rule *res ipsa loquitur* was not applicable in actions to recover damages for injuries brought by employes against their employers.

Patton v. Railway Co., 179 U. S., 658.

The above case was cited and followed in *Chicago etc. Co. v. O'Brien*, 132 Fed., 593, in holding that a state statute providing that railway companies should be liable for damages occasioned by the neglect or mismanagement of any employe, etc., "did not alter the character of the relation between the railway company and the deceased, nor the rules of evidence appropriate thereto." So was it in *Shandrew v. Railway Co.*, 142 Fed., 320, a case arising after the adoption of the Safety Appliance Act, where recovery was sought because an air brake hose burst, causing the brakes to set suddenly and violently and thereby throwing an employe from a train. Such a case would certainly be covered by the act, yet the court made no reference to it but held that the mere fact that the hose burst did not tend to prove it was defective. It was quoted from at length in *Midland*

etc. Co. v. Fulgham, 181 Fed., 91, where plaintiff's action was based upon both the Safety Appliance and the Liability Acts, yet the court said:

"The doctrine of *res ipsa loquitur* is inapplicable to actions between employers and employes for negligence or other wrongs. The happening of an accident which injures an employe raises no presumption of wrong or negligence by the employer. *Chicago & Northwestern Ry. Co. v. O'Brien*, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598; *Northern Pacific Ry. Co. v. Dixon*, 139 Fed. 737, 740, 71 C. C. A. 555, 558; *Cryder v. Chicago, R. I. & Pac. Ry. Co.*, 81 C. C. A. 559, 561, 152 Fed. 417, 419.

Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it."

In *Lyddy v. Railway Co.*, 197 Fed., 524, it was held that though defective cars were being moved in violation of the Safety Appliance Act, the fact that the brakeman met his death about such cars was not evidence that he came to his death because of the defects in them. And in *Smith v. Railway Co.*, 200 Fed., 553, it was said that "Whether defendant's liability is to be rested upon common law principles or upon the Employers' Liability Act, no recovery can be had unless the

evidence warrants a verdict that the hostler's negligence was a proximate cause of the accident," and that "The fact that decedent was struck by defendant's engine carries with it no presumption of defendant's negligence, the burden of proving which is on the plaintiff," citing *Patton v. Railway Co.*

Congress has not changed the rule announced in the *Patton* case, unless its intent to do so is inferred from a strained construction of enactments which do not purport to deal with rules of evidence or mode and manner of proof. The Supreme Court has not departed from it. We submit it controls here.

But assume that in some way there has been a modification of the rule established in the *Patton* case with respect to *res ipsa loquitur*, so that in an appropriate case it would apply in an action by an employe to recover damages from his employer caused by negligence. The rule never was that it applied in all cases, irrespective of the circumstances surrounding an injury. The circumstances were always to be considered in order to determine its applicability in a given case.

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does

not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.”

Sweeney v. Erving, 228 U. S., 238.

And whatever else may have been modified which is declared in the *Patton* opinion clearly this has not been:

“And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.”

For the same rule has been declared in variant form in *St. Louis etc. Co. v. McWhirter*, 229 U. S., at page 280, of which more hereafter.

In the case at bar, the brakes whose sufficiency is attacked were the standard Westinghouse auto-

matic type which are used on passenger equipment everywhere. They were carefully gone over, and every part put in perfect condition when the land registration rush commenced, shortly before the day of the accident. They were tested by plaintiff at the station in Spokane in the morning before starting on the day's run. The air brake inspector at Coeur d'Alene testified that he tested them in Coeur d'Alene just before the ill-fated train started on its last run. While plaintiff affects to cast doubt upon this test by saying he did not see the inspector about the train, he admits he made no test there because he expected the inspector to do it. However, whether such a test was made is immaterial, for plaintiff says the brakes worked perfectly all day, worked perfectly coming into and switching around in Coeur d'Alene, and worked perfectly when first applied in the effort to avert the impending collision. The sole evidence of deficiency in them is found in plaintiff's testimony that when he dynamited the train "It caught hold and was making a stop very nicely when all of a sudden it released * * * when I first applied the air it took hold and held for approximately, I should judge, 35 or 40 feet, then let loose" (Record, pp.).

Plaintiff, not pretending to know why the

brakes released, or to be able to give any reason based upon any fact affecting the situation as to why they should have done so, made the following guesses as to what might have occasioned it:

(1) "A piece of dirt in the triple valves."

(2) "Dirty valves in connection with the cylinders."

(3) "Rust or water will sometimes do it."

(4) Possibly "the brakes broke in two when I applied them." "They could do it."

(5) "If there was an air connection brake in the train line, they might break from putting them on too hard."

(6) "Possibly it would break the brake beam, or something like that."

(7) It would release if "you broke the cylinder; that would release it."

(8) "If you did not apply your emergency properly that might have happened."

And finally:

(9) "I don't know what did happen, and I don't think anybody else does either."

As to the triple valves, he said they were a "part of the air appliance; some of them are underneath

the cars and some of them are in the cars." If a piece of dirt getting into the triple valves caused the trouble, it did not "necessarily" get in between Coeur d'Alene and the point of collision. It might have been there all the time and only caused trouble because of the use of the emergency. "It was the first time that the valve had been used in that position for some length of time. It is not very often that a motorman has occasion to use his emergency brakes to slow her, to put that kind of a strain. He is not supposed to test his air in all positions in the yards. It is very impractical for a man in any service, any emergency appliances" (Record, pp. ~~64~~₆₅...).

Robinson, the Westinghouse expert who testified on behalf of defendant, testified there were three things which might have caused the brakes to release under the circumstances described by plaintiff.

(1) The breaking of the pipe between the auxiliary reservoir and the brake cylinder.

(2) The breaking of the reservoir or cylinder.

(3) The accidental release of the brakes by the motorman himself through "accidentally pulling the handle of the brake valve into the release position."

In order that the breaking of the pipe or reservoir or cylinder should have the effect described by plaintiff, the break would have to be in those appliances under each car, for the breaking under one car alone would only operate to set the brakes on the other cars (Record, pp. 111.)

Testimony has a definite limit of elasticity, even when given in an action like the present. That in the case at bar can be no further stretched than to establish that for some unexplained and unexplainable reason the brakes released. Plaintiff's own testimony shows that it might have been solely caused by himself. His violation of orders had put him in a position where it was necessary to use the brakes in an extraordinary position, under an unusual and excessive strain. It will hardly be supposed that in the imminent peril in which he found himself he exercised much skill and care in making the brake application. He admitted the possibility that "the brakes broke in two when I applied them * * * they could do it." He said that if there was an air connection brake in the train "they might break from putting them on too hard." Possibly "it would break the brake beam." Possibly the cylinder broke; "if you did not apply the emergency properly that might have happened."

In *Lucid v. Powder Co.*, 199 Fed., 377, your Honors somewhat qualified the positive declaration of the Supreme Court in *Patton v. Ry. Co.* that the rule *res ipsa loquitur* never applied in actions brought by an employe to recover damages for negligence from his employer by holding that it might apply in such a case where the facts were appropriate, but you said that "the doctrine is to be applied only when the nature of the accident itself not only supports the inference of the defendant's negligence, but excludes all others." The rule declared by your Honors in that case is only such as is declared by courts which have approved the rule *res ipsa loquitur* and applied it with the utmost freedom in all possible cases, including those arising out of the relation of master and servant. None is more liberal in that behalf and invokes the rule more frequently than the Supreme Court of the State of Washington, and yet that court found it necessary to say thereof:

"It has never been applied by the courts except where the facts and demands of justice make its application essential, depending upon the peculiar facts and circumstances in each particular case, and where the duty which the defendant owes the injured person is of such a nature that proof that the accident happened under the given conditions is of such value in law as to afford evidence of negligence in itself, and thus make out a

prima facie case; and only then when the producing cause of the injury is under the control of the defendant, and the accident is of such a nature that it would not ordinarily occur except from the lack of due care."

Lewinn v. Murphy, 63 Wash., 356. .

And again said the court:

"The doctrine of *res ipsa loquitur* cannot be applied to cases of this character. That rule, as applied to falling objects, covers cases where the occurrence is of such an unusual and extraordinary character that it would not happen except for want of due care, or that the cause of the fall was something over which the defendant had absolute and complete control; and that in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the defendant. Here, as we have before said, there was no evidence showing how the accident happened; whether the cement was piled too high or in an unusual manner, or in an unsafe place, or in a dangerous manner, or whether it was due to the act of fellow employes in throwing bags of cement up against the pile. 'The circumstances, therefore, leaving room for different presumptions, the rule called for had no application.' *Lewinn v. Murphy*, 63 Wash., 356, 115 Pac., 740, Ann. Cas. 1912 D. 433. Many cases are there referred to which are authoritative here."

Samardege v. Hurley-Mason Co., 72 Wash., 459.

May it be said of the evidence in this case that it "not only supports the inference of the defend-

ant's negligence, but excludes all others?" Among the factors which the plaintiff himself admitted might have caused the releasing of the brakes are his own acts. Hardly will it be claimed, we suppose, that if when the brakes were applied, just before the collision, a piece of dirt had blown up from the track and in some manner gotten into the triple valves, causing the brakes to release, there could be supposed to be negligence on the defendant's part unless there was proof that such an occurrence might have been expected and could have been guarded against. Nothing is suggested to that end. Aside from the possibility of dirt or water getting into the valves between Coeur d'Alene and the point where the brakes released, plaintiff suggests that the dirt or water might have been there all the while and not have been apparent; that the brakes might have worked perfectly under the normal conditions under which he had been using them, and have continued to do so, notwithstanding the dirt and water, but for the unusual application of the emergency. Must defendant see to it that its brakes are always kept in such condition that a disobedient employe who has put himself in a position of peril may extricate himself therefrom by an extraordinary use of them? Going yet further, plaintiff con-

ceded that the cause of release might have been the breaking of a brake beam, of a connecting pipe, or of the brakes themselves, through applying the brakes too hard. Again we ask, must a railway company which has equipped its trains with standard brakes working perfectly under the normal operation of the road, and sufficient under such conditions to control the speed of the train, be held to fail in its duty because it did not make its appliances of such surpassing strength as that they will withstand any strain which a motorman may put upon them to extricate himself from peril to which his disobedience of orders has exposed him? But finally the plaintiff admitted that it would be possible to break the cylinder and thus release the brakes by an improper application. "If you did not apply your emergency properly, that might have happened." In the light of these considerations, no application of the rule of *res ipsa loquitur* will aid in the making out of a case for plaintiff. Some new rule, one never yet written in the books, statutes or reports, must be found to hold defendant under plaintiff's own testimony. At the very least, it will be necessary to say that the Safety Appliance Act makes of railway companies insurers that their appliances will work properly under any conditions;

that they will not give way because an employe puts an extraordinary strain upon them to avoid a peril to which his own act has exposed him, or because he has used the appliances improperly, and that proof of mere failure of appliances to work, is not mere *prima facie* evidence of a breach of duty on the carrier's part, but conclusive evidence of that fact. Now there has been a tendency in some courts to make all these acts intended to protect employes against their employers' negligence insurance statutes, and to make of the mere fact of injury in connection with a violation of the statute evidence of a right of recovery. That tendency has, we think, received a bit of a setback by the decision of the Supreme Court in *St. Louis etc. Ry. Co. v. McWhirter*, 229 U. S., 265. There a brakeman who was working after he had been on duty more than sixteen hours, in violation of the Hours of Service Act, fell in front of an engine while he was walking in front of it to turn a switch and was killed. There was no evidence as to what caused him to fall, but in the state courts in which the action was brought it was held that the violation of the statute in permitting the brakeman to work beyond the hours fixed by the act was negligence *per se*, and that from his injury thereafter an inference arose that it was occa-

sioned by the negligence of the defendant. The decision of the state court went to the extreme limit, in effect making the railway company an insurer of the safety of its employes when it had violated a statute. Said the court:

“We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of

no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employe to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

If the insurance notion and the idea that the federal statutes in question make of railway companies insurers of their employes' safety under any and all conditions be rejected, there is naught in the evidence with respect to the working of the air brakes at the time of the collision which tends to convict defendant of furnishing defective apparatus unless the doctrine *res ipsa loquitur* may be invoked. That, obviously, may not be, for while this court has, as we have said, somewhat qualified the declaration of the Supreme Court in the *Patton* case that the doctrine in question never applied in actions by an employe to recover damages for injuries caused by his employer's negligence, it has not modified, or in any way questioned, the declaration of the Supreme Court in that same case, that

"Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half

a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.”

That principle is reaffirmed by your Honors in the *Lucid* case by adopting the above quotation and by the declaration in connection with it that:

“The doctrine is to be applied only when the nature of the accident itself not only supports the inference of the defendant’s negligence, but excludes all others.”

Plaintiff’s own testimony shows that the releasing of the brakes may have been caused through the breaking of some part of the appliances caused by an improper application. He admits, too, that all the causes which he suggests there might have been for such releasing may have been occasioned by the necessity for putting the brakes in the emergency position, and the necessity for so using them is established by the findings of the jury to have arisen from his wrongful act. In whatever way the testimony may be viewed, there is no room for ascribing the releasing of the brakes to defendant’s negligence unless it be ascribed on pure imaginings, and the placing upon it of the burden of exculpating itself from a wholly conjectural act of negligence, the nature of which the evidence does not even point to.

There is still another reason why *res ipsa loquitur* may not be relied upon to make out a *prima facie* case of negligence. It is that where the producing cause of an injury is as much under the control of the plaintiff as of the defendant, and the plaintiff is in a position to be as well aware of the cause of the accident as defendant, that then the rule *res ipsa loquitur* does not apply.

“It is true that, in the cases cited, this court applied the doctrine of *res ipsa loquitur* to the facts shown, and that in some of them the relation of master and servant existed. But in none of them did the servant have complete charge of the alleged defective appliances, in the sense that at the time he was exclusively using and controlling them. Appellant, as the respondent’s servant, had exclusive control and supervision of all the appliances at the time of the explosion, and for a considerable period immediately prior thereto. The maxim of *res ipsa loquitur* is applied in negligence cases on the theory that the accident, in the light of surrounding circumstances, is of such a character as to raise a presumption of negligence from the occurrence itself; and on the further theory, that the injured party is not in a position to explain its cause; while the party charged, having more favorable opportunities, is in a position to thus explain and show himself free from negligence, if such be the case. If the circumstances do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged, or if the plaintiff himself has equal or superior means of information, the doctrine will not apply.”

Lynch v. Packing Co., 63 Wash., 423.

We deem it unnecessary to cite other authorities to the exception just stated because, first, the Supreme Court of Washington is the most liberal court in the United States in the application of the rule *res ipsa loquitur* in actions between master and servant, and, second, that the court bases its statement of the rule above quoted upon such a wealth of authority as not to require additional buttressing.

Applying the principle above stated to the present case, it is clear that the rule *res ipsa loquitur* may not be invoked. Plaintiff was in charge of the air brake apparatus on his train and was using it all the while. The rules made it his duty either to test the brakes himself or to see that they were tested by the air brake inspector before leaving any terminal. He testified that he did test the brakes in Spokane on the morning of the day of the accident, because it was his duty to do so, and that he did not test them before leaving Coeur d'Alene on the ill-fated trip, though that was a terminal point, because he expected the inspector there to test them. No one could be in better position than he was to know whether there were defects in the brakes, and what they were. He had been using the brakes all day long,

and possibly had used them before that day, though the evidence is silent as to that. Upon the first theory suggested by the Supreme Court of Washington for the application of *res ipsa loquitur* in negligence cases, *viz.*, "that the accident, in the light of surrounding circumstances, is of such a character as to raise a presumption of negligence from the occurrence itself," it is manifest that the rule may not be applied here. Upon the second theory suggested by the court, *viz.*, "that the injured party is not in a position to explain its cause; while the party charged, having more favorable opportunities, is in a position to thus explain and show himself free from negligence," there is no room for its application. Plaintiff had more exclusive control over the brakes on his train, and better opportunity to know if there was anything defective or insufficient in them, than had any other employe of defendant. If the releasing of the brakes could be explained, plaintiff was in better position to explain the cause therefor than was any other employe of defendant. It is true that ordinarily after an accident the cause therefor may be determined with more or less certainty by the employer and his employes about the scene of the accident, while the injured man is unable to make any investigation and ascertain anything

respecting the cause of the accident. The usual holds good in this case to the extent that the plaintiff, because of his injury, was unable to make any investigation as to the cause for the brakes releasing. The usual does not hold good in this case, however, to the extent that the defendant, or any of its employes, could make an investigation into the cause of the accident, for the motor-car and its apparatus were completely demolished. That demolition and the destruction of all evidence of the cause of the brakes releasing, if in fact they did release, was occasioned by the wrongful act of plaintiff, for it was he who took the train out upon the road and into collision with the other train in violation of his orders.

We think it may be proper to suggest, also, that if the motor car had not been demolished by the collision and palpable evidence of the condition of the brakes thus destroyed, no claim of defective condition would ever have been heard. Said the trial judge in his opinion denying the petition for a new trial:

“The air brakes in question were of standard make and in common use; they had at all times worked perfectly up to the very moment of the accident so far as the testimony discloses, and when we consider their construction and mode of operation, coupled with the

fact that no claim of defective equipment was made of record until the filing of the fourth amended complaint many months after the accident we are at least led to suspect the *bona fides* of this claim."

Juries, however, do not require palpable evidence of defects in apparatus when the action is one by an employe to recover damages from his employer for alleged negligence, and with their conclusion upon the sufficiency of the evidence the trial judge did not feel himself justified to interfere. We only refer to the unsatisfactory character of the evidence, as indicated by the trial judge's opinion, to point our insistence that whatever merits there may be in the rule *res ipsa loquitur* when applied in some cases, there is no room for its application here unless it is designed as an instrument of rank injustice.

We are unable to find in any law of the United States any inhibition upon the Federal courts following the practice in the State of Washington of considering the special findings of a jury in connection with the whole record in the case for the purpose of ascertaining their meaning, and their relation to and effect upon the general verdict. If there is no Federal law which forbids such practice, it is patent that the jury's special

findings are in conflict with their general verdict and require the setting aside of the general verdict and the entry of judgment upon the special findings in defendant's favor. To do this is not to violate the Seventh Amendment, for so has the Supreme Court declared. If we err in these premises, however, certainly in the reasons which are urged why judgment should be entered in the defendant's favor upon the special findings, taken in connection with the reasons urged why a new trial should be granted, are sufficient cause to hold that a new trial ought to have been ordered. We pray, therefore, that the court will reverse this cause with directions to the trial judge to set aside the judgment entered in plaintiff's favor, and in lieu thereof enter judgment for defendant. If that relief is not grantable, then we pray that a new trial may be ordered.

Respectfully submitted,

GRAVES, KIZER & GRAVES,

Attorneys for Plaintiff in Error.

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IN THE
United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT.

SPOKANE & INLAND EMPIRE
RAILROAD COMPANY, a Cor-
poration,

Plaintiff in Error.

vs.

EDGAR E. CAMPBELL,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON.

BRIEF FOR DEFENDANT IN ERROR.

NOTE.—The parties hereto will be referred to throughout this brief by their trial court designations; the plaintiff in error as defendant and the defendant in error as plaintiff.

STATEMENT OF FACTS.

Counsel for defendant has not seen fit to embody in his brief any statement of the evidence introduced in this cause. We believe the evidence introduced is material, and we submit a statement of such evidence.

The plaintiff is a citizen of the State of Washington. The defendant is a corporation organized under the laws of the State of Washington and engaged in business as a carrier of interstate commerce between the City of Spokane, State of Washington, and the Town of Coeur d'Alene, State of Idaho.

(Tr. p. 6).

Plaintiff was on the 31st day of July, 1909, a motor-man in the employ of defendant, and on said date was motorman on motor No. 5, running between Spokane and Coeur d'Alene. Said train consisted of Motor No. 5 and two trailers attached, making a three-car train. On the 31st day of July, 1909, plaintiff arrived with his train at Coeur d'Alene at about 4:30; he immediately brought his train in position to return to Spokane. He received written orders from the dispatcher for the running of his train and verbal orders from his conductor, Whittlesey.

(Tr. p. 49).

Immediately after the written orders were handed to plaintiff, he was ordered by his conductor to depart. Plaintiff did start his train from Coeur d'Alene and had proceeded a short distance when he observed a train approaching on the same track from the opposite direction. Upon seeing the approaching train he did, what is termed in railroading "dynamite his

train"—that is, he applied the emergency brakes. The brakes caught hold and were making a stop very nicely, when all of a sudden the air released and the train shot forward.

(Tr. p. 50).

"If the air had worked properly and had held when the first application was made, I could have stopped my train before running into the other train. If the brakes had been working properly, I could have stopped my train within 600 feet—probably less than that."

(Tr. p. 50).

"I saw the other train coming and just as I started to turn off my power somebody back of me hollered, 'Give her the big hole.' That is what I spoke of a while ago, 'Dynamiting,' giving all the braking power you have is termed the 'big hole,' emergency. When I first applied the air it took hold and held for approximately, I should judge, 35 or 40 feet, then let loose; every thing released without any action on my part."

(Tr. p. 51).

"When brakes are in proper working order they do not release after the air is applied unless they are released by the party controlling it, and they were not released by me."

(Tr. p. 52).

"My train probably ran between 750 and 800 feet after my brakes released, before the collision occurred. The brakes were not working during that time, and had no effect."

(Tr. p. 64).

Both of plaintiff's legs were broken in the collision; he sustained internal injuries and the hearing of his right ear is entirely gone, his right leg is three inches

short, and his left leg is six inches short. He remained approximately eight weeks in the hospital at Coeur d'Alene, and was unconscious part of the time—for at least two weeks.

(Tr. p. 52).

Prior to the accident plaintiff was earning an average of \$125.00 a month, and is now earning \$75.00 per month as treasurer of the Brotherhood of Railway Trainmen, which position is elective and is not permanent.

(Tr. pp. 53 and 54).

Ed Trudell testified; That he was a brakeman in the employ of defendant on July 31, 1909, and was working on Special Motor No. 5.

(Tr. p. 66).

"My attention was first directed when Campbell set the air. I went back in the train because Campbell set the air. He set the air unusually hard, so hard I wanted to see what was the matter. I was in the front car about 6 feet from the rear platform, going up to the front end to see what orders they had. The car was crowded, people standing in the aisles and the platform was full."

(Tr. p. 67).

"I cannot say how far the train ran after he applied the emergency until it hit the other train. It took me about fifteen or twenty seconds to get off."

(Tr. pp. 67-68).

Edward L. Dixon testified: That on the 31st day of July, 1909, he met plaintiff; that witness was in the front end of motor car No. 5, about three or four feet from plaintiff; that the train went about one and one-half miles or two miles from Coeur d'Alene

when he noticed another train coming. His attention was directed to the on-coming train by Mr. Beck saying "My God, look! They're coming!" That Beck then said "give her the big hole." The trains were then about 200 yards apart. Campbell applied the emergency, and it held for a few seconds and then "leaked off."

(Tr. p. 68).

The train was going about 25 or 30 miles an hour when the plaintiff applied the emergency, and the trains were then about 200 yards apart.

(Tr. pp. 68 and 69).

Witness was formerly a railroad employee and was familiar with air brakes similar to the one on this train, and knew how air brakes work when they are in proper condition; that the air brakes on motor No. 5 did not work as if they were in proper condition. If the brakes had been in proper condition the train could have been stopped within about 225 feet.

(Tr. p. 69).

Dixon remained on the train until they hit. He felt them leaking out, when they began to get loose, and he began to back away as soon as he noticed they were leaking off.

(Tr. pp. 69-71).

For about four years witness was a locomotive fireman on the Northwestern railroad, and while there had occasion to use air brakes, and had himself stopped trains with them.

(Tr. p. 72).

There was a door leading from the motor cab to the baggage room and Dixon and Beck were standing in this door looking forward.

(Tr. pp. 71-73).

William Beck testified: That he had been a railroad man, employed as brakeman and conductor on the Northwestern railroad for about seventeen years.

(Tr. p. 72).

That he was standing on the left side of the motor-man's door in motor 5 prior to the accident. Mr. Dixon was standing to his right. When the train got somewhere near the curve he noticed the other train approaching. Beck immediately called to Campbell "For God's sake shut her off." Campbell immediately pulled his air and it just took hold for a short length of time and then the car plunged ahead again; that the train went probably 100 or 150 yards after the air began to leak off and before he jumped.

(Tr. p. 73).

Beck had had experience as a railroad man with air-brakes, and if the air had been working properly he could not state whether the train could have been brought to a full stop, but the train could have been brought to as near a stop as the other train did, if the air had worked. The trains were about 750 feet apart when he first saw it.

(Tr. p. 74).

James Delaney, a witness for the defendant, testified: That he was on the 31st day of July, 1909,

motorman on regular No. 20. He saw Motor No. 5 approaching, near Gibbs, and the trains were about 800 feet apart when he first saw it. He applied the emergency brake on Motor 20, and brought his train to a stop before the collision; that Motor 20 was stopped within a distance of about 200 feet.

(Tr. p. 78).

He had previously run equipment No. 5, and if everything had been in working order he could have stopped it within 400 feet from the time he applied the brakes.

(Tr. p. 79).

Henry John Robinson, a mechanical expert for the Westinghouse Air Brake Company, a witness called for the defendant, testified: He had examined the equipment on Motor No. 4 of the defendant company, which was similar in design to that on Motor No. 5.

(Tr. p. 104).

If the brakes were in proper working condition, with a motor car and two trailers full of people going at a speed of thirty miles an hour on a one per cent. down grade, an application of the brakes in the emergency would stop the train in between 200 and 300 feet, nor more than 300 feet and he doubted if less than 200 feet.

(Tr. p. 116).

POINTS AND AUTHORITIES.

Object of the Safety Appliance Act is to protect life of employees, and should be liberally construed to accomplish the evident intent of Congress.

Schlemmer vs. Buffalo R. & P. R. Co., 205 U. S. 1.
Chicago, Milwaukee & St. Paul Ry. Co. vs. U. S.,
165 Fed. 423.

Johnson vs. Southern Pac. Co., 196 U. S. 1.
U. S. vs. Chicago N. W. R. R. Co., 157 Fed. 611.
Winkler vs. Philadelphia R. R. Co., 53 Atl. 90.
U. S. vs. Atl. Coast Line R. Co., 153 Fed. 918.

Similar statute of New York construed and held applicable to surface railroads operated by electricity.

Kent vs. Jamestown St. Ry. Co., 98 N. E. 664.

The general verdict finds all material issuable facts in favor of prevailing party.

Indianapolis Southern Ry. Co. vs. Tucker, 98 N. E. 431 (Ind.)

Morrow vs. Bonebrake, 115 Pac. 585, s. c. 34 L. R. A. (N. S.) 1147 (Kan.)

Farmers' Savings Bank vs. Burr Forbes & Son, 132 N. W. 59 (Iowa)

Seigel W. & C. Live Stock Com. Co. vs. Johnson, 44 Pac. 206 (Okla.)

Daube vs. Phila. & R. Coal & Iron Co., 77 Fed. 713 (C. C. A. 7th Circuit)

The inconsistency between special findings and general verdict must be irreconcilable to warrant judgment on findings.

Fishback vs. Spunaugle, 92 N. W. 58 (Iowa).

Drake vs. Justice Gold Min. Co., 75 Pac. 913 (Colo.)

Tarashonsky vs. Ill. Cent. R. Co., 117 N. W. 1074.

McCorkle vs. Mallory, 30 Wash. 632.

Findings which are mere conclusions may be disregarded by the court.

Fishback vs.. Spunaugle, 92 N. W. 58 (Iowa).
Lake Shore & M. S. Ry. Co. vs. McIntosh, 38
N. E. 476.

Distinction between proximate cause and cause which proximately contributes is recognized by the courts.

McFail vs. Barnwell Co., 35 S. E. 562 (S. C.)
Wragge vs. South Carolina & G. R. Co., 33
L. R. A. 191 (S. C.)
Chicago & N. W. Ry. Co. vs. Prescott, 59 Fed.
237 (C. C. A.)
Andrews vs. R. R. Co., 42 N. W. 513.
Skjeggerud vs. Ry. Co., 35 N. W. 572.
Grand Trunk Western Ry. Co. vs. Lindsay, 201
Fed. 836 (C. C. A. 7th Circuit)
Louisville & N. Co. vs. Wene, 202 Fed. 887
(C. C. A., 7th Circuit).
Choctaw, Oklahoma & Gulf R. R. Co. vs. Hol-
laway, 191 U. S. 334.

What is proximate cause?

Deming vs. Merchants' Cotton Press & Storage
Co., 13 L. R. A. 518 (Tenn.)
Atkinson T. & S. R. Co. vs. Calhoon, 213 U. S. 1.

Under the Safety Appliance Act, an absolute duty rests on a carrier, not only to equip its trains with brakes, but also to maintain the equipment in accordance with standard set by Congress.

St. Louis I. M. & S. R. Co. vs. Taylor, 210
U. S. 281.
Delk vs. St. Louis S. F. R. Co., 220 U. S. 578.
Chicago, B. & Q. R. Co. vs. U. S., 220 U. S. 559.
Donegan vs. Baltimore & N. Y. Ry Co., 165 Fed.
869 (C. C. A.)
Atlantic Coast Line R. Co. vs. U. S., 168 Fed. 175.

Smith V. Atlantic &c. R.R.
Advance Sheets Fed. Rep. April 9,
1914, page 761.

- U. S. vs. Atchison T. & S. F. R. Co., 163 Fed. 517 (C. C. A.)
 U. S. vs. Denver & R. G. R. Co., 163 Fed. 519 (C. C. A.)
 Chicago, M. & St. P. Ry. Co. vs. U. S., 165 Fed. 423 (C. C. A.)
 U. S. vs. Wheeling & L. E. R. Co., 167 Fed. 198.
 Indiana Union Traction Co. vs. Abrahams, 101 N. E. 1.

Violation of a duty imposed by statute is negligence per se.

- Cummings vs. Kenney, 89 N. Y. Supp. 579.
 Madden vs. Hughes, 93 N. Y. Supp. 324.
 Indiana Union Traction Co. vs. Abrahams, 101 N. E. 1 (Ind. 1913).
 Grand Trunk Western Ry. Co. vs. Lindsay, 201 Fed. 836 (C. C. A.)
 Waverly Co. vs. Beck, 103 N. E. 332 (Ind. 1913).
 Gallenkamp vs. Garvin Mach. Co., 99 N. E. 718 (N. Y.)
 Pinnell vs. Kelly, 99 N. E. 772.

ARGUMENT.

A discussion of the principles involved in this appeal, to us, seems to fall under three headings:

FIRST: Is the Federal Safety Appliance Act applicable to electric interurban trains engaged in interstate commerce?

SECOND: Do the special findings made by the jury entitle the defendant to judgment non obstante veredicto?

THIRD: A discussion of the evidence and an application of the Employers' Liability Act to the facts in this case, as interpreted by the decisions.

We shall discuss the respective headings in the order indicated.

First—Counsel for defendant has devoted pages 103 to 122 of his brief to an attempt to show, by decisions of the State Courts, that the Safety Appliance Act is not applicable to interstate electric railroads. Upon examination of these cases, it appears that all of them, with the exception of *Indianapolis, Etc. Ry. Co. vs. Andis*, 72 N. E. 145, were cases where it was held that street cars did not come within the purview of state statutes relating to locomotives and engineers.

The case of *Indianapolis, Etc. Ry. Co. vs. Andis*, supra, was decided upon a prior holding of the supreme court of Indiana, in the case of *Jarvis vs. Hilch*, 67 N. E. 1057, in which the word "locomotive" was defined, and the strict interpretation in that case, and that sought by counsel for defendant in the case at bar, we believe, is not in accord with the remedial spirit of the Safety Appliance Act, or the interpretation

placed thereon by the Supreme court of the United States in numerous decisions.

In the case of *Schlemmer vs. Buffalo, R. & P. R. Co.*, 205 U. S. page 1, the Supreme Court of the United States says:

"The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars. These considerations apply to shovel cars as well as to locomotives, and show that the words "used in moving interstate traffic" should not be taken in a narrow sense."

There appear to be no decisions where the act has been interpreted in reference to electric interurban railroads, and the question is one of first impression and must be decided from an examination of the statute itself and on principle.

The purpose of the Safety Appliance Act of 1893, is set forth succinctly in its title:

"To promote the safety of employees and travelers upon railroads by compelling common-carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes."

The Safety Appliance Act of 1893 was amended in 1903, and by Sec. 1 of said amendment it was held:

"To apply to common-carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to *all trains, locomotives, ten-*

*ders, cars and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all locomotives, tenders, cars and similar vehicles, used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of Section 6 of said Act of March, 1893, as amended by the Act of April 1, 1896, or which are used upon street railways."*

Counsel for defendant on page 106 of his brief argues, that the act should not be held to apply to electric interurban trains, because when the act was adopted, electricity as a propulsive power was in its infancy and was used only in an experimental way on a few street car lines, and that there were no carriers engaged in interstate commerce business, using electricity as a propulsive power.

It seems to us that this argument of counsel fails when we read the concluding words of paragraph 1 of the Safety Appliance Act, as amended in 1903, which expressly exempts trains, cars and locomotives used upon street railways. Can it be successfully argued, that Congress expressly excluded trains used on street railways from the provisions of the act, because it was feared, that the act might, by interpretation, be applied to them, and did not exclude interurban electric trains, because there was no liability of their being included?

The Safety Appliance Act has been given a liberal construction by Federal Courts that the intent of Congress might be effectuated. The case of *Chicago, Milwaukee & St. Paul Ry. Co. vs. U. S.*, 165 Fed. 423, holds that the statute applied to steam shovel cars, con-

sisting of machinery bolted to a platform and supported by trucks.

Johnson vs. Southern Pacific Co., 196 U. S. 1, holds, that *any car* means all kinds of cars running on rails, including locomotives.

U. S. vs. Chicago N. W. R. R. Co., 157 Fed. 611, holds that the statute applies to an engine which hauls, but does not carry freight.

In Winkler vs. Philadelphia & R. R. R. Co., 53 Atl. 90, it was held, that the tender of a locomotive engine engaged in interstate commerce is a car and is within the scope of this act.

In the very recent case of Spokane & Inland Empire R. R. Co. (defendant in this case) vs. U. S. (not yet reported), the question of whether an interurban electric railway company was guilty of violating the Safety Appliance Act for failure to equip its cars with grab irons was recently before this Court. In that case, as in the case at bar, counsel for defendant argued in his brief for a technical construction of the statute. It was there held, that the fact that defendant company used street car tracks in entering and leaving the City of Spokane did not take them without the provision of the act, and that failure to equip its train with grab irons was a violation of the act.

The case of Kent vs. Jamestown Street Ry. Co., 98 N. E. 664 (N. Y. 1912), is by analogy applicable to the facts in this case.

Plaintiff's intestate, a motorman, engaged in running an electric car, was killed in a collision with a similar car, running upon the same track in the opposite direc-

tion, in violation of a signal that had been given to the motorman in charge of that car.

Under Section 64 of the Railroad Law, the employee of the defendant having physical control or direction of the car that caused the collision was not a fellow servant of the intestate. The Court stated as follows:

“There is but one question requiring our consideration in this opinion, and that is whether Section 64 of Railroad Law is applicable to a railroad organized as a Street Service Railroad Corporation.”

Section 64 of the Railroad Law provides:

“That in all actions against railroads for personal injuries to or the death of an employee by the negligence of the corporation or its employees, every employee shall have the same right and remedy as are now allowed by law and, * * * if an employee engaged in the service of any such railroad corporation shall be injured by any defect in the condition, ways, works, machinery, tools or implements, or any car, train, locomotive or attachment thereto belonging to the corporation, when the defect could have been discovered by reasonable care, the corporation shall be deemed to have knowledge of the defect.”

The court in this case held that said section was applicable to a Street Surface Railroad Corporation, and in discussing the proposition said:

“The defendant is organized as a street surface railroad corporation, and is engaged in running cars in the City of Jamestown, and to and from adjoining villages, by electric power conveyed by trolley wires. By the express terms of said section of the Railroad Law, it is applicable to ‘all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof.’

It is not by its terms in any way restricted or limited to particular railroads, or to railroads organized for a particular purpose. * * * In 1906, when that section was added to the Railroad Law, railroads organized as street surface railroads had extended their mileage and so modified their manner of doing business that in many respects they resembled steam railroads. Some steam railroads have changed their motive power upon all or a part of their routes to electricity, and motormen are necessarily employed by railroads organized as steam railroads; and some of the employees of railroads are engaged during a portion of each day on cars propelled by steam, and during another portion of the day upon cars propelled by electricity. Railroads organized and known as street surface railroads frequently extended their routes outside and beyond the streets of cities and villages, and from village to village and from city to city. They run their passenger and freight cars at a rate of speed quite equal to that of an ordinary express train on a steam road, and stop at designated places.

"The reasons for changing the common law rule relating to negligence by a fellow servant are by many considered as controlling when applied to employees of street surface railroads as to employees of steam railroads. Electric and other cars commonly used by street surface railroads generally stop more frequently and run through less guarded territory than the cars of an ordinary steam railroad; but the whole system of doing business by street surface railroads has become intricate, and a system of signals and rules upon such roads, which must be literally obeyed, is becoming, if it is not now, as important as are signal and rules and their obedience upon steam roads."

In view of the liberal construction placed upon the Safety Appliance Act, by numerous decisions, it is evident Congress, by the amendment of 1903, intended

that the act should apply to all railroads engaged in interstate commerce, except those used on street railways, and those expressly excluded by Section 6 of the act as amended in 1896.

Second—Do the Special Findings returned by the jury entitle defendant to judgment non obstante verdicto?

The purpose of submitting special findings to a jury to be answered in addition to returning a general verdict is that the Court may ascertain *facts* upon which the general verdict is based, and when special findings upon *all* material points are submitted to the jury, and the answers thereto cannot be reconciled with the general verdict, the decisions hold that the special findings control. However, four things must concur for the special findings to control the general verdict, to-wit:

(a) There must be a special finding of all facts necessary to support the contention of the party moving against the general verdict.

(b) These special findings must be in accord with each other.

(c) They must be irreconcilably inconsistent with the general verdict.

(d) The special findings must be findings of fact, and not mixed questions of law and fact or conclusions. The special findings submitted in this case are as follows:

1. "Did the plaintiff Campbell receive, before leaving Coeur d'Alene, train order 53, reading as follows:

'Train order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene station.

Motor 5 will run Spl. C. D. Alene to Spokane; meet Special 4 east at Alan' "?

"Yes."

2. "If you find that plaintiff left Coeur d'Alene in violation of his orders, then answer this question: 'Was that leaving in violation of his orders the proximate cause of the accident?'

"Yes."

3. "Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?"

"Yes."

Where a portion only of the facts are found by the jury, the law conclusively presumes that the jury found all facts not answered by the special interrogatories in favor of the party recovering judgment. It must be remembered that this action was brought under the Federal Employer's Liability Act, Section 3 of which provides:

"That no such employee who may be injured shall be held guilty of contributory negligence where violation by such common-carrier of any statute contributed to injury of such employee."

Argument is not necessary, that all material facts in the case at bar were not answered by the special findings. An examination of the pleadings shows that there is no special finding, that the failure of the brakes to work immediately prior to the accident did not contribute directly and proximately to the injury; there is no finding that defendant maintained its equipment according to standard imposed by Congress. The law presumes that each of these find-

ings were answered by the jury in its general verdict in favor of the plaintiff. Therefore, if it should be held that the finding actually made as to insufficiency of brakes to control the speed of the train immediately prior to the accident, and the findings presumed are inconsistent with the finding, that the leaving of Coeur d'Alene, in violation of his orders by plaintiff was the proximate cause of the accident (which inconsistency is assumed for the purpose of argument only), the findings would neutralize each other, and the general verdict must control.

In the case of *Farmers' Savings Bank v. Burr Forbes & Son*, 132 N. W. 59 (Iowa 1911), we find this language:

"There cannot be a judgment upon answers to special interrogatories, unless these answers cover every issue in the case, and, when taken in connection with the pleadings (and possibly with the instructions), are in themselves sufficient to enable the court to determine which party is entitled to the judgment without referring to the testimony. * * * When these (special interrogatories) cover every fact or issue in controversy, the right to recover became purely a question of law. It is then like determining the rights of the parties upon an agreed state of facts, so, where a fact is absolutely essential to recovery, a finding negating its existence will be conclusive without more. But often the interrogatories do not include all the issues of fact essential to reach a legal conclusion, and then it becomes of the utmost importance to know what extrinsic matters, if any, may be resorted to in aid of these findings. Every reasonable presumption is to be indulged in favor of the general verdict. All essential facts inhere therein when the contrary is not made to appear from the special findings. So that every

question of fact raised during the trial, unless withdrawn from the jury by the Court, is answered, though not specially found in response to some interrogatory."

In the case of *Conwell v. Tri-City Ry. Co.*, 112 N. W. 546, the Court said:

"On a motion for judgment against a general verdict based on special findings, every issue raised by the pleadings and not eliminated by the instructions will be presumed to have been found for the party in whose favor the general verdict is returned, and it will be presumed that such findings are supported by sufficient evidence; but the special findings cannot be added to or supported by the evidence, and must be given effect only so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict."

Indianapolis Southern Ry. Co. v. Tucker, 98 N. E. 431 (Ind. 1912).

"The general verdict finds every material issuable fact in favor of appellee, which includes a finding that appellee received all the injuries alleged in the manner stated in the complaint. * * *

"It has been held that when the facts found by the jury in answer to interrogatories are such only as to preclude a recovery upon one branch of a case, and no facts are found which preclude a recovery upon another branch, it will be presumed that the jury based their verdict upon the branch of the case upon which the answers were not inconsistent with the general verdict."

In *Morrow vs. Bonebrake*, 115 Pac. 585 (s. c.) 34 L. R. A. (N. S.) 1147 (Kan. 1911), the Supreme Court of Kansas used this language:

"The general verdict for appellee imports a finding in her favor upon every material allegation in her petition and every issue in the case not inconsistent with the special findings. 'When the special

finding of facts is inconsistent with the general verdict, the former controls the latter.' (Civ. Code, No. 294), but, where a question of consistency arises, nothing is presumed in aid of special findings, while every reasonable presumption is indulged in favor of the general verdict."

In *Seigel, W. & C. Live Stock Com. Co. vs. Johnson*, 44 Pac. 206, the Supreme Court of Oklahoma said:

"The judgment entered was, as the record shows, rendered 'on the verdict in the case on the issues raised in the attachment proceedings'; and this verdict was a general verdict in favor of the defendants. This verdict was a general finding in favor of the defendants upon all the issues presented to the jury, and it was a general finding in favor of the parties for whom the jury found of all the facts necessary to support the verdict."

The Circuit Court of Appeals for the Seventh Circuit, in the case of *Daube vs. Philadelphia & R. Coal & Iron Co.*, 77 Fed 713, lays down the following rule:

"In determining the force of a special verdict or finding, only the facts found, unmodified by the statements of counsel or by reference to the evidence, can be considered. The silence of the verdict in respect to a fact is equivalent to an express finding against the party who has the burden of proof."

In order for motion for judgment upon special interrogatories to be granted, the inconsistency between special findings and the general verdict must be irreconcilable.

In *Fishbaugh vs. Spunaugle*, 92 N. W. 58 (Iowa), the following language is used:

"This court has held that, although there is an apparent inconsistency between some of the special find-

ings and the general verdict, yet if, upon taking them as a whole, such inconsistency is not necessarily to be implied, the general verdict must stand. * * * The question is not to be determined by singling out some one special finding for consideration, but all must be considered together in the light of the pleadings. * * * No mere superficial inconsistency is sufficient to invalidate the verdict. It must be so irreconcilable that both cannot possibly stand. * * * We have at least gone to the extent of saying that, 'if there was evidence to sustain the general verdict, it will not be disturbed, though the special finding may not seem to sustain it. * * * The court will not strain a point to discover an inconsistency between the verdict and the finding * * *, but on the contrary, the finding will, if possible, be so construed as to support the verdict. * * * And all reasonable presumptions will be indulged to support the verdict.'

In *Drake v. Justice Gold Min. Co.*, 75 Pac. 913 (Colo. 1904), the Court said:

"Where a special finding of fact, inconsistent with the general verdict, is so irreconcilable therewith as to be incapable of removal by any evidence admissible under the general issues, the general verdict cannot stand, and judgment entered upon it is improper. Every presumption and intendment, however, is to be indulged in favor of a general verdict, and in ascertaining whether such inconsistency exists recourse may not be had to the evidence actually adduced at the trial, but may be to the issues as made by the pleadings; and if, by any possible competent evidence that might be produced thereunder, the apparent inconsistency can be overcome, it may be disregarded, and the general verdict permitted to stand."

In *Tarsahonsky vs. Illinois Cent. R. Co.*, 117 N. W. 1074 (Iowa 1908), the Court said:

"An answer to the interrogatory must be con-

clusive against the verdict in order to warrant disregarding the latter."

Our own Supreme Court, in the case of *McCorkle vs. Mallory*, 30 Wash. 632, said:

"Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given the special verdict which will support the general verdict."

Special findings must be findings of ultimate facts and not mixed questions of law and fact or conclusions, and the Court is at liberty to disregard any finding which is a conclusion.

In *Fishbaugh vs. Spunaugle*, 92 N. W. 58, the Court in discussing this proposition said:

"And, where a special finding is more in the nature of a conclusion of law than a finding of fact, it may be disregarded by the court. * * * A question whether transactions by a partner were within the scope of the partnership business was held to involve more of law than of fact, and not a proper subject of special finding by the jury."

In the case of *Lake Shore & M. S. Ry. Co. vs. McIntosh*, 38 N. E. 476 (Ind.), the Supreme Court in discussing an interrogatory, finding that the collision was the proximate cause of the injury, said:

"So, to the answer of the jury to the interrogatory finding that the collision was the proximate cause of the injury, it may be sufficient to say that this was but a conclusion, and cannot affect the facts found as to all matters connected with the accident. It was for the jury to find the facts showing the condition of the crossing and surroundings, and everything else necessary in relation to the manner in which the injury was brought about; but it was for the court to draw the conclusion as to what one

or more of such facts, if any, constituted the proximate cause or causes of the death of the intestate.”

In the light of the foregoing authorities, we submit, that the special findings do not cover all facts necessary to support the contention of the defendant; that there is a conclusive presumption that all facts not found by the jury were found in favor of the plaintiff; that the facts found, together with the facts presumed to have been found, are not inconsistent with the general verdict, and that the finding that the proximate cause of the collision and injury was the disobedience of orders is a conclusion and not a finding of fact, and may be disregarded by the Court.

The doctrine of proximate cause has been discussed at length by counsel for defendant, and it appears to us that the main reliance of defendant is upon the special finding of the jury in regard to proximate cause, which is not a finding of fact, but a conclusion of the jury, a mixed question of law and fact, and may be disregarded.

It must be remembered that this is an action brought in the Federal Courts, by a citizen of the State of Washington against a Washington corporation, based upon the Employers' Liability Act, as amended in 1903, and is not an action based upon the common law, wherein the doctrines of assumption of risk and contributory negligence are applicable. Congress recognizing the injustice to employees of the doctrines of assumption of risk and contributory negligence in cases where common-carriers were engaged in interstate commerce, by enactment, swept them aside

and substituted the Employers' Liability Act. That portion of the Act which is particularly pertinent to the matter now under discussion is Section 3 of the Act as amended in 1903, as follows:

"Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any sense where the violation by such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees."

There is a wide distinction between a proximate cause and a cause which proximately contributed to an injury, and this distinction is recognized by Congress in the Employers' Liability Act, and by the Courts in interpreting similar statutes.

We call attention to the case of *McFail vs. Barnwell County*, 35 S. E. 562, where this question was squarely presented to the Court.

In South Carolina, there is a statute that any person who shall receive bodily injury to his person through defects of a highway, may recover in an action against the county, the actual damages sustained.

"Provided such person has not in any way brought about such injury or damage by his own act or negligently contributed thereto."

The Court charged the jury as follows:

"You will inquire whose negligence caused the injury and if you are satisfied that plaintiff's negligence was the proximate cause of the injury, the defendant must not be held liable."

Error was predicated on this instruction, and in discussing the proposition, the Supreme Court of South Carolina said:

"It seems to us that one thing is understood to contribute to a given result when such thing has some share or agency in producing such result, and is not understood to convey the idea that such thing was the efficient cause of such result in the sense that without it such result would not have occurred."

The case was reversed by reason of the error complained of in the above instruction.

Wragge vs. South Carolina & G. R. Co., 33 L. R. A. 191, is also an instructive case upon this point. There is a statute in South Carolina that if a person is injured by collision with the engines or cars of railroad corporations at a crossing, and it appears that the corporation neglected to give the signals required by statute, and that such negligence contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless it is shown that the person injured was at the time of the collision guilty of gross or willful negligence, which contributed to the injury.

Defendant requested an instruction that the jury must conclude that the failure to give the required statutory signals was the proximate cause of the injury sustained before they could render a verdict for the plaintiff. This instruction was refused and appeal was predicated on the refusal to give said instruction. The Court in discussing the statute said:

"Now, it will be observed that there is nothing in the language found in this section calculated to convey the idea that the legislature intended to make the liability of the railroad company dependent upon the fact that the neglect to give the statutory signals was the proximate cause of the injury com-

plained of; and, on the contrary, the language used implies no such intention. All that the statute requires is that the neglect to give the prescribed signals shall contribute to the injury, which, in our judgment, is a very different thing from saying that such neglect must be the proximate cause of the injury."

It is a well settled rule of law, that there can be a proximate cause and a contributing cause to an injury, and that two or more acts of negligence may proximately contribute to the same injury.

In *Chicago & N. W. Ry. Co. vs. Prescott*, 59 Fed. 237 (C. C. A.), we find this language used:

"With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse, which plaintiff was driving, it is only necessary to say that the shying of the horse cannot be regarded as the sole proximate cause of the injury. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding."

To the same effect see:

Andrew vs. Railroad Co., 42 N. W. 513.

Skjeggerud vs. Ry. Co., 35 N. W. 572.

Corey vs. Railroad Co., 21 N. W. 479.

The Supreme Court of the United States in *Choctaw, Oklahoma & Gulf R. R. Co. vs. Holloway*, 191 U. S. 334 s. c. 48 Law Ed. 207, recognized this distinction.

The ground of negligence relied on was failure of defendant to equip its engine with shoe brakes. The tender and other cars were equipped with air brakes; plaintiff discovered a horse on the track and applied his air; the brakes on the tender and train were successfully applied, but by reason of the absence of shoe

brakes on the engine, the brakes thereon could not be worked. The effect of applying air brakes on the train was to stop the tender and car and the engine was forced with great momentum against the tank. In attempting to escape plaintiff was injured. The defendant urged that the proximate cause of injury was not the absence of brakes, but the presence of the horse on the track.

In discussing this proposition the Court said:

"We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident, was therefore, a proximate cause thereof. If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only because there was no brake on the engine, the result would be that the company would never be liable, no matter what its negligence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This cannot be true."

The case of *Grand Trunk Western Ry. Co. vs. Lindsay*, 201 Fed. 836 (C. C. A. 7th Circuit), is an instructive case in an interpretation of Section 3 of the Employers' Liability Act. In this case action was brought by a switchman, under the Employers' Liability Act, for injuries received by reason of failure of couplers to couple automatically. Defendant requested an instruction, that if it was found by the jury that plaintiff did a certain act, such act was the proximate

cause of the injury, and that he could not recover. This instruction was refused as being contrary to Section 3 of the Employers' Liability Act, and the appeal is based upon the refusal to give this instruction. On petition for rehearing, the Court said:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

The case of *Louisville & N. E. Co. vs. Wene*, 202 Fed. 887 (C. C. A. 7th Circuit), involves a construction of Section 3 of the Employers' Liability Act. Plaintiff's intestate was a conductor on freight No. 72. No. 72 was standing on a sidetrack and was run into on the sidetrack by passenger No. 52. It was the duty of the conductor on No. 72 to close the switch after his train had gone upon the sidetrack, and this he failed to do. No. 52 ran past the switch light at the end of the switch and off of the main track onto the sidetrack and collided with the rear end of No. 72. In this collision the plaintiff's intestate was killed. It was conceded that plaintiff's intestate was negligent, and the defendant requested instructions that the failure of the conductor to close the switch was the prox-

imate cause of the injury, and that no recovery could be had. This instruction was refused.

It seems to us that the learned trial judge in this case has succinctly explained the true meaning and intent of Congress, as shown by Section 3 of the Employers' Liability Act in his opinion denying the motion for judgment non obstante.

"Can it be said as a matter of law that the special finding, that the disobedience of orders on the part of the plaintiff was the proximate cause of the accident, defeats a recovery under the Employers' Liability Act? I am of the opinion that it cannot. The air brakes and other equipment required by the Safety Appliance Act are for use in an emergency, whether that emergency arises from unavoidable accident or from neglect. A collision does not of necessity result from disobedience of orders on the part of an employee, and if the employee who has been guilty of such disobedience is unable to avoid an impending collision because of defective equipment furnished by the master, it surely cannot be said that the defective equipment in nowise contributed to the accident. If it did contribute a liability exists under the act in question."

(Tr. p. 31).

We deem it useless to enter upon an extensive discussion of the subject of proximate cause. No general rule can be laid down which is applicable to all cases, because each case must depend primarily upon its particular facts, and because proximate cause and a cause contributing proximately to an injury shade into each other. We shall, however, cite two cases, which on fact and principle, we believe will shed light upon the issues in the case at bar.

Deming vs. Merchants' Cotton Press & Storage Co., 13 L. R. A. 518 (Tenn.), is particularly instructive. In this case cotton was stored in the compress of the defendant and was destroyed by fire. Twenty-nine bales were standing on the track in loaded cars at the compress. The twenty-nine bales were scheduled to depart at seven o'clock. There was a delay in the time of starting of about seven to ten minutes, caused by the breaking of a drawbar, and the cotton in the cars was destroyed by fire. The Court had previously held, that the Compress Company was not liable by reason of any negligence for the fire. The question was therefore squarely presented to the Court, whether the proximate cause of the loss of the twenty-nine bales of cotton was caused by the burning of the compress or the breaking of the drawbar.

"It is insisted here, in support of the finding, that neither the delay nor the breakage of the train, but the fire, was the proximate cause of the loss. In this we do not concur. Granting that the slight delay would not of itself have made the company liable, here we have, in addition, the breaking of the train machinery when the effort is made to remove the cotton, but for which it might have been saved notwithstanding the fire. This, we think, was therefore the proximate cause of the loss. * * * It is true that the fire destroyed cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned had not the breaking of the train while it was being removed happened, so that but for this fact the cotton would have been saved. This must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it."

The case of *Atchinson T. & S. R. Co. vs. Calhoon*, 213 U. S. 1; s. c. 53 Law Ed. 671, is also somewhat similar to the case at bar. Plaintiff, who was about three years of age, was a passenger upon a train of defendant and was bound for Edmond. The trainmen did not announce the arrival of the train at Edmond, and after the train had started from Edmond, the mother handed her son to a passenger, who in turn handed the boy to a party on the station platform. This party, with the child in his arms, ran along the side of the moving car and attempted to return the child to its mother. In doing so he stumbled over a baggage truck standing on the platform, and the child fell under the car and was injured. The question involved was, what was the proximate cause of the child's injury. The Court in discussing this proposition used this language:

"In this case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word 'cause' when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate, and not remote, causes, and, in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause."

The finding therefore that disobedience of orders was the proximate cause of the injury does not negative the implied finding that the failure of brakes to work immediately prior to the collision was a cause contributing to the injury.

Third—For the purpose of this brief, we shall concede that Campbell's orders read, that Special 5 should meet Special 4 at Alan, and that he misread his orders. We except, however, to the statement of counsel for defendant, that "the jury found that Campbell testified falsely." We think this statement is outside of the record, and believe that a careful reading of the testimony shows that Campbell believed at the time he left Coeur d'Alene, and now believes, that his orders read that No. 5 should meet Regular No. 20 at Alan.

The only question of fact remaining to be discussed is the sufficiency of the testimony in regard to the insufficiency of the brakes to control the speed of the train immediately prior to the accident. There is no dispute that Campbell was a competent employee. In fact, the whole record shows that he was regarded by his employers as their best motorman—he had run the Shoshone Special, the "crack train" on the road for over a year prior to the accident. On the 31st of July, 1909, Campbell left Coeur d'Alene at about 4:30 p. m. on his return trip to Spokane. When about one and one-half miles from Coeur d'Alene he observed Regular 20 on the same track approaching from the opposite direction. Campbell testified that he observed No. 20 when it was about 800 feet distant; that he im-

mediately applied the emergency brakes; that the air took hold and then began to leak off, and he was unable to stop the train.

(Tr. pp. 50-51-64).

In this he is corroborated by the testimony of Dixon, a locomotive fireman, an employee of the Northwestern Railway Company for four years, who is familiar with air brakes and had himself stopped trains with the emergency brake. Dixon says that the trains were about 200 yards apart when Campbell applied the emergency; that it held for a few seconds and then leaked off.

(Tr. pp. 68-69).

Each of these witnesses is corroborated by Beck, a brakeman and conductor, for seventeen years in the employ of the Northwestern Railway Company, who was standing in the open door of the cab about four feet from Campbell, talking to Dixon, and each of them had an unobstructed view of the track ahead.

The testimony of Trudell, brakeman on Special No. 5, also corroborates the uncontradicted testimony of Dixon, Beck and Campbell in regard to the place where the emergency was applied. Trudell said that he felt the air set unusually hard—so hard he wanted to see what was the matter; that he went to the rear door of the car, through the crowd standing in the aisles and on the platform and got off before the collision, and that it took him about fifteen or twenty seconds to get off.

(Tr. pp. 67-68).

The testimony of numerous witnesses was to the effect that No. 3 was running from thirty to thirty-five miles an hour. Conceding that thirty miles an hour was the true rate of speed, No. 5 would have been running about 44 feet a second, and would have run, according to Trudell, from 660 to 880 feet after the brakes were set, which corroborates the testimony of Campbell, Dixon and Beck.

As opposed to this uncontradicted testimony, defendant called a number of passengers as witnesses, whose testimony was of a negative character. They all testified that they felt the brakes applied and the crash followed almost immediately. None of these witnesses were in a position to observe the track ahead of the moving train, as were all of the witnesses for the plaintiff. Their testimony therefore is of a very unsatisfactory quality, and does not in any sense contradict the positive unimpeached testimony of the witnesses, Beck, Dixon and Trudell. The trial judge, in his opinion in passing upon the motion for new trial, said:

"They had little to guide them in forming an opinion except the mere lapse of time between the application of the brakes and the ensuing collision and this is admittedly a very unsafe and uncertain guide in a crowded train where nothing out of the ordinary is expected or anticipated."

(Tr. p. 41).

We therefore submit that the jury were warranted in finding, from the testimony as a whole, that Campbell applied his air when from 600 to 800 feet from the place where the collision occurred.

It is conceded by the pleadings that the brakes on Special No. 5 should have stopper^d the train within 300 feet if they had been in proper working order. The testimony of Campbell, Dixon, Beck and Delaney, all railroad men, and of Henry J. Robinson, the Westinghouse expert, called by the defendant, all was to the effect that the train could have been stopped in between 200 or 300 feet, if the brakes had been in proper working order.

The question therefore naturally arises, why was the train not stopped and the collision averted? Counsel for defendant ingeniously argues, that the defendant is not liable, because Campbell testified that a number of different things might have prevented the brakes from working properly. He forgets, however, that Campbell testified positively that he did not release the brakes after the emergency was set.

(Tr. p. 52).

He also forgets the testimony of Dixon, the locomotive fireman, who said the brakes "leaked off." There is no testimony that the brakes released suddenly, as if released by the motorman, but the testimony of all of the witnesses is that the brakes held for a few seconds and then gradually released. If Campbell had released his air, the brakes would not have leaked off, but would have released suddenly.

Counsel also forgets the testimony of Dixon, that he knows how air brakes work when they are in proper condition, and that the brakes of No. 5 did not work as if they were in proper condition.

(Tr. p. 69)

Does counsel contend that plaintiff must show by the brakes themselves, that they were defective, or that the defects therein may not be shown by circumstantial evidence?

It is uniformly held under labor laws, that failure to perform statutory duty is negligence *per se*.

Cummings vs. Kinney, 89 N. Y. Sup. 579, is a case in which this question was before the court in regard to the labor laws of the State of New York. The labor laws of New York provide, that persons employing or directing any kind of erection shall not furnish for the performance of labor any unsafe ladders, etc. Plaintiff was a hodcarrier, and while using one of the ladders furnished by the defendant one of the rounds broke. It was held under the above mentioned section, that the breaking of the ladder round raised a presumption of negligence entitling plaintiff to go to the jury.

Madden vs. Hughes, 93 N. Y. Sup. 324, was also a case where a labor law was interpreted. In that case the court held, that the unexplained breaking of a plank on which a servant is working is sufficient to warrant the submission to the jury of the master negligence under a labor law, requiring masters to furnish safe scaffolding or other mechanical contrivances. In the same case the Court used this language, which has also been applied to the Safety Appliance Act.

"The purpose of the statute was to impose an absolute duty on the master, which cannot be delegated."

In the case of *Grand Trunk Western Ry. Co. vs. Lindsay*, 201 Fed. 836 (C. C. A.), discussing the Safety Appliance Act, the Court said:

"It was negligence per se for the defendant to use the car having defective couplers, even though the shoving of the cars together was accidental."

The learned trial judge, in the case at bar to us seems to have clearly stated the duty resting on the carrier under the Safety Appliance Act.

"It is almost universally held that the violation of a statutory duty is negligence per se and if it be such it must be negligence on the part of those officers, agents or employees who are charged with the duty of complying with the statutory requirements. * * * The use, therefore, by the defendant company of an electric motor not equipped with a power drive wheel brake so that the motorman driving the train could control its speed was negligence per se upon the part of its representatives charged with the duty of meeting the statutory obligation."

(Tr. p. 43).

Indiana Union Traction Co. vs. Abrahams, 101 N. E. 1 (Ind. 1913), is a case where practically the same facts were involved as in the case at bar. We shall refer to this case later in our brief, but call attention at this time only to the following portion of said opinion:

"The happening of the accident, under the facts found by the jury was prima facie evidence of appellant's negligence, which imposed upon it to show some excuse for the prima facie duty on its part."

In the case of Waverly Co. vs. Beck, 103 N. E., 332 (Ind. 1913), the Court held:

"That a violation of the Factory Act, prohibiting any person from employing any young person between the ages of fourteen and eighteen years to operate any elevator, constitutes negligence per se, and contributory negligence was not a defense."

In *Gallankamp vs. Garvin Machinery Co.*, 99 N. E. 718 (N. Y.), the Court held:

“That the employment of a child under fourteen years of age, in a factory in violation of labor laws is evidence of negligence on the part of the employer, and will justify recovery for injuries sustained.”

In *Pinnell vs. Kelly*, 99 N. E. 772, the Supreme Court of Indiana held:

“That failure to guard a shafting and pulleys thereon was negligence per se where the statute provides that all vans, planers, and machinery of every description in factories should be guarded.”

The Supreme Court of the United States in a long line of decisions has held, that the duty resting upon a common carrier by railroad, engaged in interstate commerce, to equip its trains with sufficient air brakes and with automatic couplers is an absolute duty, and that the requirement of the statute is not satisfied by using reasonable care to see that the equipment furnished is in perfect condition.

There are two reasons why Congress has placed an absolute unqualified duty upon the common carrier. First, the protection of the lives of passengers and employes, by requiring the exercise of a higher degree of supervision by the carrier; and second, a legislative policy which deems it is just that the carrier should be liable for injuries to employes while in its service, on the theory that the added expense should be charged as a part of the maintenance and operation of the carrier.

We cite the case of *Chicago, B. & Q. R. Co. vs. U. S.*, 220 U. S. 559, s. c. 55 Law Ed. 582, as a case

in which there is an able discussion of the Liability Act, and the degree of care necessary to be exercised by the carrier. In this case the Court said:

“Does the act of Congress in question impose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars? Can the carrier engaged in moving interstate traffic escape the penalty prescribed for a violation of the act, in the particulars just mentioned by showing that it had exercised reasonable care in equipping its cars with the required couplers, and had used due diligence to ascertain, from time to time, whether such cars were properly equipped? * * *

“The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that ‘no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.’ There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it.”

In the case of *Delk vs. St. Louis & S. F. R. Co.*, 220 U. S. 578, s. c. 55 Law Ed. 590, the Supreme Court of the United States, speaking by Justice Harlan, said:

"The circuit court of appeals, in its opinion, said that the trial court gave the law to the jury by stating the language of the statute, but in such a way as to lead the jury to suppose that the statute imposed an absolute duty on the carrier to keep its cars in good order at all times. An order was therefore made reversing the judgment of the circuit court, and directing the case to be sent back for a new trial. But this court granted a writ of certiorari, and the case is here primarily for the review of the judgment of the circuit court of appeals.

"The construction of the statute, adopted by a majority of the circuit court of appeals, to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its best endeavor to meet the requirements of the statute, has been rejected by this court in *Chicago, B. & Q. R. Co. vs. United States*, just decided, and on the authority of that case, we hold that the circuit court of appeals erred in the particular mentioned."

The case of *St. Louis, I. M. & S. R. Co. vs. Taylor*, 210 U. S. 281, s. c. 52 L. Ed. 1061, is a leading case upon this question. Justice Moody in speaking for the Court said:

"We need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple

words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violated the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

The case of *Indiana Union Traction Co. vs. Abrams*, 101 N. E. 1 (Ind. 1913), is a case very similar to the case at bar. In Indiana there is a statute modeled after the Federal Employers' Liability Act applicable to interurban electric trains doing intrastate business. The statute provides:

"That it shall be unlawful for any common-carrier in this state operating an interurban railway by electric power to operate or run upon any railroad in this state any motor car used in regular interurban passenger traffic which is not equipped with an approved power air brake, in good condition, and subject to the control and operation of the motorman in charge of such car, and of sufficient capacity to control the speed of the car." Section 14 of the act (Section 5291, Burns' Stat. 1908) contains the following provisions: "That any employe of any such common-carrier, who may be * * * injured by any * * * car * * * in use contrary to the provisions of this act * * * shall not be deemed thereby to have assumed the risk thereby occasioned * * * nor shall any such employe be held as having contributed to his injury, in any case where the carrier shall have violated any of the provisions of this act. * * *"

The facts in this case are as follows: Plaintiff was motorman on a passenger train and was injured in a collision with a freight car. The passenger car had right-of-way over the freight car, and under the rules of the road the freight cars should have stopped at a siding. When plaintiff first saw the freight car he was 650 to 700 feet from the place of the accident. Plaintiff's car was running twenty-five miles per hour and the freight car was running about thirty-five miles per hour. Plaintiff attempted to apply his brakes as soon as he observed the freight car, but the car traveled 150 or 200 feet before the brakes took hold. At the time of the accident the freight car had almost stopped. The passenger car, if equipped with standard brakes in good condition, could have been stopped in from 350 to 400 feet. The braking equipment was carefully tested the day before the accident, and when delivered to the plaintiff the brakes were in apparently good condition, and under ordinary circumstances were of sufficient capacity to control the speed of the car. The brakes were not worn or weak and apparently not broken. The jury found that the brakes were procured from manufacturers of recognized standing as manufacturers of power air brakes. The Court in discussing the law applicable to the facts said:

"Appellee claims that the statute imposed on appellant the absolute duty to equip the car according to the provisions of the act, and this duty was not discharged by showing that the car was equipped with an approved air brake, in 'apparent' good condition, not 'apparently' broken, and of sufficient capacity to control the car 'under ordinary conditions'; that appellant's lack of actual knowledge of the de-

fect in the brake and the exercise of ordinary care in equipment and inspection do not meet the requirements of the act. The statute in question is similar to Act. Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), which rendered it unlawful for any carrier engaged in moving interstate traffic by railroad to use on its line any locomotive engine not equipped with a power driving-wheel brake and appliances for operating the train brake system, or to run any train in such traffic that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed. * * * Mr. Justice Harlan delivered the opinion of the court, and it deals with the questions here in controversy as to the construction of the statute. It was held that the duty of the carrier is an absolute one, which is not met by the exercise of reasonable care and diligence in equipment and inspection. In enacting our statute, evidently modeled after the act of Congress it cannot be doubted that the legislature was not satisfied with the duty and liability of carriers to their servants, as defined by common-law rules, and by this act of 1907 it intended that such duty and liability should be measured by a stricter rule. This rule is set out in the act in language so plain as to practically foreclose discussion as to the legislative intent. We think the duty prescribed by the act of 1907 is absolute, and it is not discharged by proof of the use of ordinary care in equipment and inspection. * * *

"The complaint alleges that the brake was not in good condition, and was not of sufficient capacity to control the speed of the car. The statute requires both qualities. The duty exacted to equip with power air brakes in good condition is not performed in supplying a brake in a condition which was good in appearance only. * * * Neither is the demand of the statute satisfied by equipment with a brake of sufficient capacity to control the speed of the car 'under ordinary conditions.' It must have been

contemplated by the Legislature in enacting the statute that extraordinary conditions might arise, as did here, when the only means of safety to passengers and employes would lie in the quick control of the car's speed by the application of the air brake. The title of the act (Acts 1907, p. 186) recites that it is 'An act to promote the safety of employes and travelers,' etc. To hold that equipment, sufficient only for ordinary conditions, fulfills the statutory requirement, would be the subversion of the plain intent of the enactment. * * * The happening of the accident under the facts found by the jury was *prima facie* evidence of appellant's negligence, which imposed on it the obligation to show some excuse for the *prima facie* failure of duty on its part. *Terre Haute, etc. R. Co. v. Sheeks* (1900), 155 Ind, 74, 56 N. E. 434. No such excuse is shown by the findings. The facts specially found do not contradict the general verdict in its finding that appellee's injury was proximately caused by appellant's failure to equip the car with an air brake in good condition, or of sufficient capacity to control the speed of the car."

We have quoted at length from this decision because the facts and the statute of Indiana, upon which the action is based, are practically identical with the facts in the case at bar. So far as we have been able to find this case is more nearly in point than any other decision, and it seems to us that the law as set forth by the Indiana Court is based both upon reason and a fair interpretation of the statute.

It is conclusively shown by the record that the brakes on Campbell's train were not sufficient to control the speed thereof immediately prior to the accident. One purpose of Congress in enacting the

Safety Appliance Act was undoubtedly to meet just such emergencies as in the case at bar. Congress recognized that orders are liable to be misinterpreted, that human beings are not infallible, and has imposed upon the common carriers, engaged in interstate commerce, the absolute duty not only to equip their trains with air brakes sufficient to control the speed thereof under ordinary circumstances, but also to equip with brakes which would perform their services in emergencies similar to those in this case. A failure so to do on the part of defendant was a violation of the Safety Appliance Act, and the defendant is liable in damages to the plaintiff for the injuries received.

In conclusion, we submit that the Federal Employers' Liability Act and the Safety Appliance Act, as amended in 1903, are applicable to the defendant railroad company; that the special findings are not in conflict, but are in accord with each other; that the preponderance of the evidence shows that the failure of the brakes to work contributed to the injury, and that the verdict of the jury is supported both by the law and the evidence.

For the foregoing reasons we respectfully submit that the judgment of the lower Court should be affirmed.

Respectfully submitted,

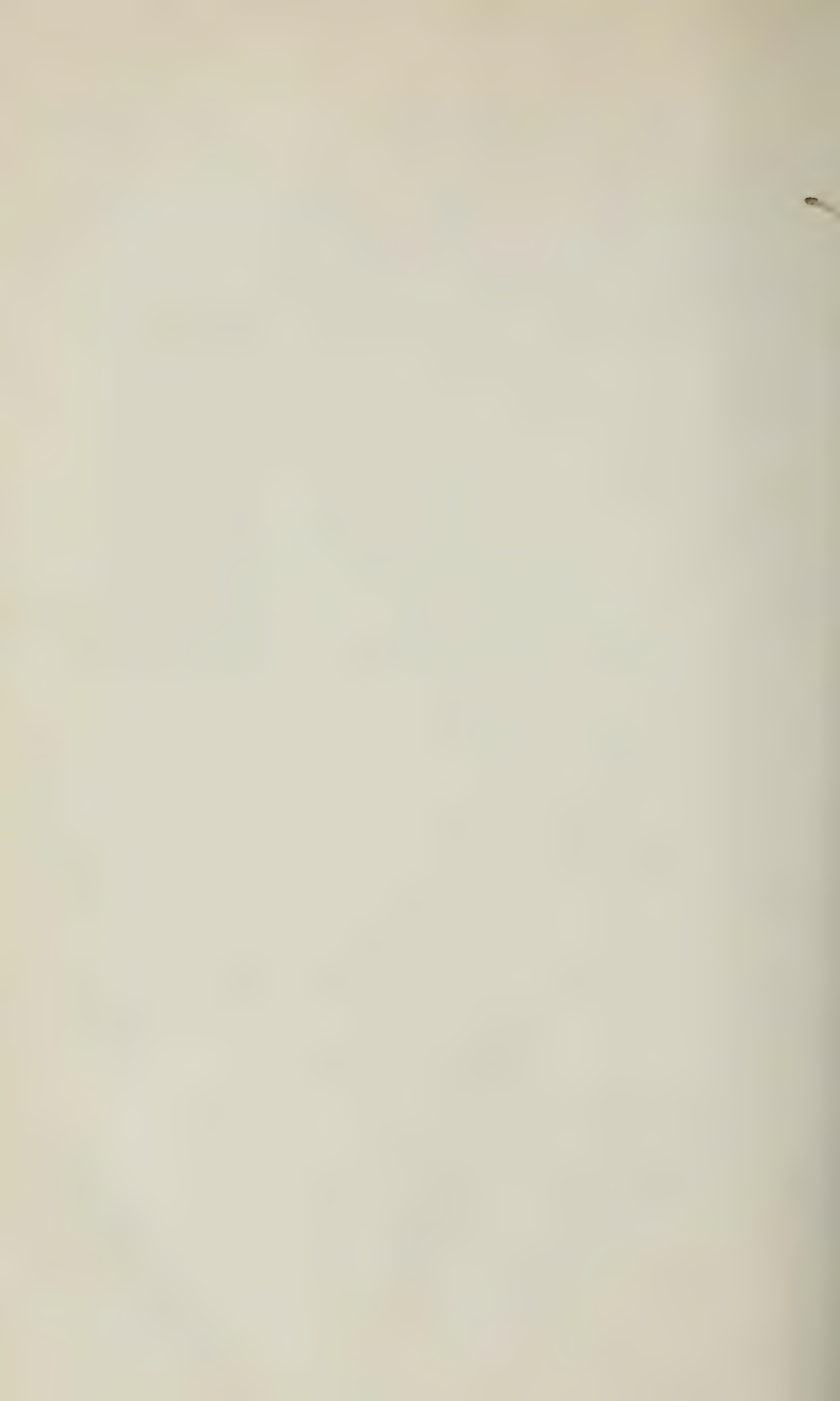
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United States
Circuit Court of Appeals

For the Ninth Circuit.

WALTER B. BLISS and FRESNO MONOGRAM
ADJUSTABLE BUCKLE COMPANY, a
Corporation,

Appellants,

vs.

GEORGE P. SPANGLER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California,
Southern Division.

FILED

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No. 2370

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court, Southern Dis-
trict of California, Southern Division.*

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS et al.,

Defendants.

Citation [on Appeal (Original)].

United States of America,—ss.

To George P. Spangler, Greeting:

You are hereby cited and admonished to be and ap-
pear at a session of the United States Circuit Court
of Appeals for the Ninth Circuit, to be held at the
city of San Francisco, in the State of California, on
the 23d day of October, A. D. 1913, pursuant to an

*Page number appearing at foot of page of original certified Record.

order allowing an appeal entered in the Clerk's office of the District Court of the United States of America, of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division, from an interlocutory judgment and decree signed, filed, entered and recorded on the 4th day of August, 1913, in that certain cause, being in equity, No. 209—Civil, wherein Walter B. Bliss and Fresno Monogram Adjustable Buckle Company are defendants and appellants, and you are complainant and appellee, to show cause, if any there be, why the interlocutory judgment and decree rendered against said appellants, in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, ~~of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division,~~ this 24th day of September, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the [4] one hundred and thirty-seventh.

OLIN WELLBORN,
United States District Judge for the Southern District of California.

Received copy of the foregoing citation this 24th day of September, 1913.

RAYMOND IVES BLAKESLEE,
Solicitor for Complainant Spangler. [5]

[Endorsed]: In the United States District Court, Southern District of California, Southern Division.

No. 209—Civil. George P. Spangler, Complainant,
vs. Walter B. Bliss et al., Defendants. Citation.
Filed Sep. 29, 1913. Wm. M. Van Dyke, Clerk. By
Chas. N. Williams, Deputy Clerk.

Eq. Rule Book 338. [6]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS and FRESNO MONOGRAM
ADJUSTABLE BUCKLE COMPANY,
Defendants. [7]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY.

GEORGE P. SPANGLER,

Complainant,

vs.

FRESNO MONOGRAM ADJUSTABLE
BUCKLE COMPANY, MODERN SALES
AGENCY OF AMERICA, LIMITED, and
WALTER B. BLISS,
Defendants.

Bill of Complaint.**FOR INFRINGEMENT OF LETTERS PATENT.**

To the Honorable, the Judges of the District Court of the United States, in and for the Ninth Circuit, Southern District of California, Southern Division:

George P. Spangler, a citizen of the State of California, and resident of Los Angeles, County of Los Angeles, California, brings this his Bill of Complaint against Fresno Monogram Adjustable Buckle Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles in said State of California, in said Southern District of California, Southern Division thereof; and Modern Sales Agency of America, Limited, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, in said State of California, in said Southern District of California, Southern Division thereof; and Walter B. Bliss, a citizen of the State of California, and resident of Los Angeles, County of Los Angeles, State of California, in said Southern District of California, Southern Division thereof; and thereupon, your orator complaining, shows unto your Honors:

I.

That heretofore and prior to the 5th day of May, 1910, your orator, George P. Spangler, was the original, first and sole inventor of a certain new and useful clasp or buckle, not known or [8] used by

others, before his invention or discovery thereof, or patented or described in any printed publication in the United States of America or any foreign country, before his invention or discovery thereof, or more than two (2) years prior to his application for letters patent thereon in the United States of America, and not in public use or on sale in the United States of America for more than two (2) years prior to said application for letters patent thereof, and not abandoned, and not patented in any foreign country on an application filed more than twelve (12) months prior to the filing of said application in the United States.

II.

That your orator, so being the original, sole and first inventor of said clasp or buckle, to wit, on the 5th day of May, 1910, made application in writing in due form of law to the Commissioner of Patents, in accordance with the then existing laws, in such case made and provided, and complied in all respects with the conditions and requirements of said law; that thereafter such proceedings were duly and regularly had and taken in the matter of said application, that, to wit, on the 18th day of October, 1910, letters patent of the United States, No. 972,937, were duly and regularly granted, issued, and delivered by the Government of the United States to your orator, according to law, whereby there was granted and secured to your orator, his heirs, legal representatives and assigns, for the full term of seventeen (17) years from and after said 18th day of October, 1910, the sole and exclusive right, liberty and privilege to make, use

and vend the said invention throughout the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office, and duly signed by the acting United States Commissioner of Patents, he having full authority to sign the same, all as will more fully appear from said original letters patent [9] or a duly certified copy thereof, which are ready in court to be produced by your orator; and that prior to the granting and issuance and delivery of said letters patent, all proceedings were had and taken which were required by law to be had and taken prior to issuance of letters patent for new and useful inventions.

III.

That the invention set forth, described and claimed in and by said letters patent No. 972,937, aforesaid, is of great value and has been extensively practiced by your orator; and upon each and every one of said clasps or buckles manufactured, used or sold by your orator, the word "Patented," together with the day and date of the issuance of said letters patent, to wit, October 18th, 1910, has been marked or stamped thereon or *displaced* thereon by a ticket or the like attached thereto, thereby notifying the public of the said letters patent; and that the said defendants long prior to the commencement of this suit have been notified in writing of the granting and issuance of said letters patent No. 972,937, and of the rights of your orator thereunder, and demand has been made upon said defendants to respect the said letters patent, and not to infringe thereon, but notwithstanding such

notice the defendants have continued to make, use and sell clasps or buckles embodying the said invention, as hereinafter more particularly set forth.

IV.

And your orator further shows to your Honors that the trade and public have generally respected and acquiesced in the validity and scope of said letters patent No. 972,937, and in the exclusive rights of your orator, and save and except for the infringement thereof by the defendants, as hereinafter set forth, your orator has had and enjoyed the exclusive right, liberty and privilege, since October 18th, 1910, of manufacturing, using and selling clasps or buckles, embodying and containing the invention [10] described, set forth and claimed in said letters patent No. 972,937, and but for the wrongful and infringing acts of defendants, as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to your orator.

V.

And your orator further shows unto your Honors and alleges upon information and belief that notwithstanding the premises, but well knowing the same, and without the license or consent of your orator, and in violation of said letters patent, and of your orator's rights thereunder, the defendants herein, Fresno Monogram Adjustable Buckle Company, Modern Sales Agency of America, Limited, and Walter B. Bliss, as aforesaid, have, jointly, as parties participating in the manufacture, use and sale of clasps or buckles within the County of Los Angeles

and State of California, and within the Southern District of California, Southern Division, aforesaid, within the year last past and prior thereto, and elsewhere, jointly made, used, and sold, and are now jointly making, using, and selling clasps or buckles embodying, containing and embracing the invention described, claimed and patented in and by said letters patent No. 972,937, and have jointly infringed upon the exclusive rights secured to your orator by virtue of said letters patent, and jointly continue to and now are jointly infringing thereon, and that the clasps or buckles so jointly made, used and sold by the defendants were and are infringements upon said letters patent of your orator, and each of said clasps or buckles contains and has contained in it said patented invention; and that although requested so to do, the defendants have refused to cease and desist from the infringement aforesaid, and are now jointly making, using and selling clasps or buckles containing and embracing the said patented invention and jointly threaten and intend to continue so to do, and will continue so to [11] do unless restrained by this Court; and are realizing, as your orator is informed and believes, large gains, profits and advantages, the exact amount of which is unknown to your orator; and that by reason of the premises and the unlawful acts of the defendants aforesaid, your orator has suffered and is suffering great and irreparable injury and damage.

VI.

That for all the wrongs herein complained of, your orator has no plain, speedy or adequate remedy at

law, and is without remedy, save in a court of equity where matters of this kind are properly cognizable and relievable.

To the end, therefore, that the said defendants may, if they can show why your orator should not have the relief herein prayed, and may, according to the best and utmost of their knowledge, recollection, information and belief, but not under oath (an answer under oath being hereby expressly waived), full, true and perfect answer make to all and singular the matters and things hereinabove charged, your orator prays that the defendants and each of them may be enjoined and restrained, both provisionally and perpetually, from further infringement upon said letters patent, and may be decreed to account for and pay over to your orator the gains and profits realized by the defendants from and by reason of the infringement aforesaid, together with costs of suit.

May it please your Honors to grant unto your orator a writ of injunction issued out of and under the seal of this court, provisionally and until the final hearing, enjoining and restraining said defendants, Fresno Monogram Adjustable Buckle Company, Modern Sales Agency of America, Limited, and Walter B. Bliss, their attorneys, officers, agents, workmen, and employees, from making, using and selling any clasps or buckles containing or embracing the invention patented in and by said letters patent, and that upon the final hearing of this case said provisional [12] injunction may be made final and perpetual, and that your orator may have such other and further relief as to your Honors may seem proper

and in accordance with equity and good conscience.

May it please your Honors to grant unto your orator the writ of subpoena issued out of and under the seal of this court directed to the defendants, Fresno Monogram Adjustable Buckle Company, Modern Sales Agency of America, Limited, and Walter B. Bliss, commanding them by a day certain and under a certain penalty fixed by law, to be and appear before this Honorable Court, then and there to answer this Bill of Complaint and to stand to and perform and abide by such further orders and decrees as to your Honors may seem meet in the premises.

And your orator will ever pray.

GEORGE P. SPANGLER.

RAYMOND IVES BLAKESLEE,

Solicitor and Counsel for Complainant,
728-29-30 California Bldg., Los Angeles,
Calif. [13]

State of California,
City of Los Angeles,
County of Los Angeles,—ss.

On the second day of November, 1912, before me personally appeared George P. Spangler, who being duly sworn did depose and say that he is the complainant mentioned in the foregoing Bill of Complaint; that he has read the Bill and knows the contents thereof, and that the same is true to his knowledge and belief, except in so far as matters are therein stated on information and belief, and as to those matters, he verily believes them to be true.

GEORGE P. SPANGLER.

Subscribed and sworn to before me, this 2d day of November, 1912.

[Seal]

H. H. HARRIS,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June, 7, 1914.

[Endorsed]: No. 209—Civil. In the United States District Court, Southern District of California, Southern Division. George P. Spangler, Complainant, vs. Fresno Monogram Adjustable Buckle Company, Modern Sales Agents of America, Ltd., and Walter B. Bliss, Defendants. In Equity. For Infringement of Letters Patent. Bill of Complaint. Filed Nov. 4, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Raymond Ives Blakeslee, Suite 728-30 California Bldg., 2nd and S. Broadway, Los Angeles, Cal., Solicitor and Counsel for Complainant. [14]

[Answer of Walter B. Bliss.]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY.

GEORGE P. SPANGLER,

Complainant,

vs.

FRESNO MONOGRAM ADJUSTABLE
BUCKLE COMPANY, MODERN SALES
AGENCY OF AMERICA, LIMITED, and
WALTER B. BLISS,

Defendants.

The answer of Walter B. Bliss to the bill of complaint, this defendant reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill, comes and answers thereto, or so much thereof as he is advised is material to be answered, says:

I.

This defendant has no knowledge or belief as to the allegations set forth in paragraph I of complainant's bill of complaint, but demands strict proof of the same.

II.

This defendant has no knowledge or belief as to the allegations set forth in paragraph II of complainant's bill of complaint, but demands strict proof of the same.

III.

This defendant has no knowledge or belief as to the allegations set forth in paragraph III of complainant's bill of complaint, but demands strict proof of the same.

IV.

This defendant has no knowledge or belief as to the allegations set forth in paragraph IV of complainant's bill of complaint, but demands strict proof of the same.

V.

This defendant denies that the defendants herein, the [15] Fresno Monogram Adjustable Buckle Company, Modern Sales Agency of America, Limited, and Walter B. Bliss, have, in violation of the letters patent, set forth and referred to in the com-

plainant's bill of complaint, or in violation of any letters patent or in violation of the rights of said complainant, jointly, as parties or separately participated in the manufacture and use and sale of clasps or buckles within the county of Los Angeles, State of California, or within any other county or State within the year last past, or within any other time or times, have jointly or separately made, used and sold, or are now jointly or separately making, using or selling clasps or buckles embodying or containing or embracing the invention described in complainant's bill of complaint and in the letters patent, to which reference therein is made. Defendant denies that the above-named defendants, jointly or separately have infringed upon the exclusive rights secured to complainant by virtue of the said letters patent. Defendant denies that the above-named defendants, jointly or separately, continue and are now infringing on the exclusive rights of the said complainant; and defendant denies that the clasps or buckles made, used and sold, jointly by the above-named defendants were or are an infringement upon the said letters patent; and defendant denies that the clasps or buckles made, used and sold jointly by the said defendants contains or has *contained it*, the patent invention covered and set forth in said letters patent No. 972,937 as issued to the complainant; and defendant denies that by reason of the manufacture, use and sale by the above-named defendants, of the clasp or buckle manufactured and sold by them, has caused the complainant to suffer or is causing said complainant to suffer any great or irreparable injury

and damage, or any injury or damage at all.

Having thus made full answer to all material matters and things contained in complainant's bill of complaint, this [16] defendant prays to be dismissed hence with his costs in this — above incurred.

WALTER B. BLISS.

NEIGHBOURS, SPROUL & HOAG,

Solicitors and Counsel for Walter B. Bliss,
Defendant,

401 Chamber of Commerce Building,
Los Angeles, California.

Service of the within answer by copy is hereby acknowledged this 3d day of January, 1913.

RAYMOND IVES BLAKESLEE,

Attorney for the Complainant.

[Endorsed]: No. 209-Civil. United States District Court, Southern District of California, Southern Division. George P. Spangler, Complainant, vs. Fresno Monogram Adjustable Buckle Co. et al., Defendants. Answer of Walter B. Bliss. Filed Jan. 3, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [17]

[Answer of Fresno Monogram Adjustable Co.]

In the United States District Court, Southern District of California, Southern Division.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS et al.,

Defendants.

Now comes the Fresno Monogram Adjustable Buckle Company substituted as defendant for the Monogram Buckle and Manufacturing Company and answering complainant's complaint denies that prior to the 5th day of May, 1910, or prior to any other day, George P. Spangler was the original or first or sole inventor of a certain new and useful clasp or buckle as set forth in paragraph 1 of the complaint. Denies that the said clasp or buckle was not known or used by others before the said alleged invention thereof by said Spangler. Denies that the said clasp or buckle was not patented or described in any printed publication in the United States of America or any foreign country. Denies that the said clasp or buckle was not in public use or on sale in the United States of America prior to the supposed invention thereof by said Spangler. Denies that on May 5, 1910, or at any other time said Spangler made application in writing in due form of law to the Commission of Patents and complied in all respects with the conditions and requirements of the law. Denies that thereafter any proceedings were duly and regularly

had in the matter of said Spangler's application so that on October 18, 1910, letters patent of the United States were duly and regularly granted, issued and delivered to said Spangler as set forth in paragraph 2 of the complaint. Denies that prior to the issuance and delivery of said alleged letters patent all proceedings were had and [18] taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

Denies that the invention set forth and claimed in said letters patent 972,937 is of great or any value or that the same has been extensively practiced by said Spangler. Denies that the buckles manufactured by said Spangler have been marked with the word "patented" with the date of said patent or by a ticket or the like attached thereto. Denies that any notice or demand has been made upon this defendant not to infringe upon said letters patent. Denies that this defendant has made or used or sold clasps or buckles embodying the invention set forth in said letters patent referred to in said bill of complaint. Denies that the public generally have respected and acquiesced in the validity and scope of said letters patent 972,937 or in the exclusive rights of said Spangler. Denies that said Spangler has had and enjoyed the exclusive right, liberty and privilege since October 18, 1910, or any other day of manufacturing or using or selling buckles described in letters patent 972,937. Denies that this defendant jointly with Walter B. Bliss, or at all, has participated in the manufacture or use or sale of clasps or buckles at

any place or at any time of clasps or buckles embodying the invention described in said letters patent 972,937, or that they are now jointly or otherwise making or using or selling buckles containing the invention described in said letters patent 972,937. Denies that any buckles made or used or sold by this defendant were or are infringements upon the letters patent set forth in the bill of complaint, or that any of said buckles contain the said patented invention. Denies that this defendant jointly or otherwise threatens or intends to continue to infringe upon the alleged rights secured to complainant by said alleged letters patent. Denies that complainant has suffered or is suffering great or irreparable injury or damage from any act of this defendant. [19]

For a further and separate defense this defendant alleges that the alleged invention described and claimed in the letters patent sued on herein or substantially the same was long prior to the supposed invention and discovery thereof by complainant described and patented in and by the following letters patent of the United States, namely: No. 132,051, issued to F. Busch, Oct. 8, 1872; No. 2,051,715, issued to E. G. Latta, July 2, 1878; No. 279,382, issued to P. Hayes June 12, 1883; No. 391,545, issued to J. T. Merritt Oct. 23, 1888; No. 492,256, issued to G. M. Aylsworth Feb. 21, 1893; No. 544, 856, issued to E. D. Koopman August 20, 1895; No. 556,413, issued to E. Graves March 17, 1896; No. 577,850, issued to M. T. Goldsmith March 2, 1897; No. 672,793, issued to C. E. Mixer April 23, 1901; No. 803,576, issued to T.

H. Fishel Nov. 7, 1905; 957,415, issued to W. M. Giffey May 10, 1910.

Defendant further answering avers that in view of the prior state of the art pertaining to clasps and buckles that there was and is no patentable invention in the said alleged clasp or buckle described in the letters patent sued on herein, but that the same or substantially the same clasp and buckle was well known in the art prior to the alleged invention thereof by complainant and that if there is anything different from what was known or discovered in said prior art it was not the result of patentable invention but was wholly the result of the ordinary skill of the ordinary mechanic.

WHEREFORE, this defendant having fully answered, humbly prays this Honorable Court to enter its judgment that this defendant be hence dismissed with his reasonable costs and in this behalf wrongfully sustained, and for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

G. E. HARPHAM,

Solicitor for Defendant Fresno Monogram Adjustable Buckle Company and of Counsel. [20]

[Endorsed]: No. 209. Dept. ——. In the United States District Court, Southern District of California, Southern Division. George P. Spangler, Complainant, vs. Walter B. Bliss et al., Defendants. Answer of Fresno Monogram Adjustable Buckle Company. Received copy of the within answer this 10 day of February, 1913. Raymond Ives Blakeslee, Solicitor for Complainant. Filed Feb. 10, 1913.

Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. George E. Harpham, 698 Pacific Electric Building, Los Angeles, California, Solicitor for Defendant. [21]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS, FRESNO MONOGRAM
ADJUSTABLE BUCKLE COMPANY, and
MODERN SALES AGENCY OF AMERICA,
LIMITED,

Defendants.

Interlocutory Decree.

FOR INFRINGEMENT OF LETTERS PATENT.

This cause having come on to be heard on July 22d, 1913, upon the pleadings, proceedings and proofs herein, filed on behalf of both parties, and after hearing Raymond Ives Blakeslee, Esq., counsel for complainant, and George E. Harpham, Esq., counsel for defendants Walter B. Bliss and Fresno Monogram Adjustable Buckle Company, and the Bill herein having been taken *pro confesso* against defendant Modern Sales Agency of America, Limited, and after due proceedings had, it is, upon consideration, ordered, adjudged and decreed as follows:

I.

That letters patent of the United States of America, No. 972,937, issued to George P. Spangler, the complainant, on the 18th day of October, 1910, for clasps or buckles are good and valid in law.

II.

That said George P. Spangler was the first, true and original inventor of the invention and improvement described and claimed in said letters patent No. 972,937, and that the said invention was not known or used by others before said George P. Spangler's invention or discovery thereof, or patented or described in any printed publication in the United States of America, or any foreign country, before said George P. Spangler's [22] invention or discovery thereof, or more than two years prior to said George P. Spangler's application for letters patent thereon in the United States of America, or in public use or on sale in the United States of America for more than two years prior to said George P. Spangler's said application for letters patent therefor, and not abandoned.

III.

That the complainant, George P. Spangler, is the lawful owner of said letters patent No. 972,937, as set forth in the Bill of Complaint, and of all rights of action and claims for past infringement thereof.

IV.

That the defendants, Walter B. Bliss, Fresno Monogram Adjustable Buckle Company and Modern Sales Agency of America, Limited, have jointly infringed upon the said Letters Patent No. 972,937,

and upon the exclusive rights of the complainant under the same, by the manufacture, use and sale of clasps or buckles like Complainant's Exhibits "E" and "F," and intend and threaten to continue such infringement.

V.

That all clasps or buckles manufactured, used or sold by complainant since the issuance of said letters patents No. 972,937, and embodying or containing said patented invention claimed in said letters patent No. 972,937, have been plainly and distinctly marked by having printed on each thereof the abbreviated word "Pat," together with the words and figures "Oct. 18 -1910," thereby duly notifying the defendants, and each of them, of said letters patent No. 972,937, before the defendants commenced jointly to make, use or sell the infringing clasps or buckles, and likewise and similarly duly notified the defendants, and each of them, of complainant's rights under said letters patent No. 972,937; but defendants jointly made, used and sold the infringing clasps and buckles, knowing [23] the same were claimed by complainant to be an infringement of said letters patent, and being fully aware of said letters patent; and to that end and further the defendants and each of them were otherwise duly notified of said letters patent No. 972,937, and of complainant's right thereunder, and complainant demanded that the defendants, and each of them, cease such infringement.

VI.

That the complainant recover of the defendants and each of them the profits, gains and advantages

which the said defendants have derived, received or made, by reason of said joint infringement of said letters patent No. 972,937, and that the complainant do recover of the said defendants, and each of them, any and all damages which the complainant has sustained or which he shall sustain by reason of said joint infringement by said defendants.

VII.

And it is hereby referred to Lynn Helm, Esq., as the Master of this Court, who is appointed *pro hac vice*, to take and state the account of said gains, profits and advantages, and to assess such damages and to report thereon with all convenient speed; and the defendants Walter B. Bliss, Fresno Monogram Adjustable Buckle Company and Modern Sales Agency of America, Limited, their attorneys, clerks, officers, employees, servants, agents, associates and workmen, are hereby directed and required to attend before said Master from time to time, as required, and to produce before him *to* such books, papers, records, vouchers and documents, and to submit to such oral examination, as the master may require.

VIII.

That a perpetual injunction issue out of and under the seal of this Court, directed to the said defendants Walter B. Bliss, Fresno Monogram Adjustable Buckle Company and Modern Sales Agency of America, Limited, their attorneys, officers, agents, servants, associates, clerks and workmen, enjoining and restraining them and each of them from directly or indirectly making or causing to be [24] made using or causing to be used, or vending to others to

be used, in any manner, any article, device or clasp or buckle, containing, embodying or embracing the said invention or improvement granted and covered and claimed by the said letters patent, No. 972,937, or any clasp or buckle capable of being combined or adapted to be used in infringement of said letters patent, or infringing upon or violating the said letters patent in any manner whatsoever.

IX.

That the complainant do recover of the defendants, and each of them, his costs and disbursements of this suit to be taxed, and that the question of increase of damages and further questions be reserved until the coming in of the master's report.

Dated, Los Angeles, California, August 4th, 1913.

Costs Taxed at \$153.40.

By the Court.

OLIN WELLBORN,

District Judge.

Decree entered and recorded August 4th, 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: In the United States District Court, Southern District of California, Southern Division. In Equity for Infringements of Letters Patent. No. 209—Civil. George P. Spangler, Complainant, vs. Walter B. Bliss, Fresno Monogram Adjustable Buckle Company, and Modern Sales Agency of America, Limited, Defendants. Interlocutory Decree. Filed August 4, 1913. Wm. M. Van Dyke,

Clerk. By C. E. Scott, Deputy Clerk. Raymond Ives Blakeslee, 728-29-30 California Bldg., Los Angeles, California, Solicitor and Counsel for Complainant. [25]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS, FRESNO MONOGRAM
ADJUSTABLE BUCKLE COMPANY, and
MODERN SALES AGENCY OF AMERICA,
LIMITED,

Defendants.

Abstract of Testimony.

Be it remembered that the evidence on behalf of complainant was taken before V. J. Cobb, a Notary Public of Los Angeles County, California, pursuant to notice and stipulation of counsel for the respective parties, commencing at 2 o'clock P. M., March 24th, 1913, and there were present Raymond Ives Blakeslee, Solicitor for Complainant, Charles W. Hoag, Solicitor for Defendant Bliss, and G. E. Harpham, Solicitor for Defendant Fresno Monogram Adjustable Buckle Company, and the following proceedings were had, each witness being first duly sworn before his examination began.

Solicitors for the respective parties stipulated that uncertified copies of U. S. Letters Patent might be offered and received on behalf of all parties with the same force and effect as if duly certified, subject to all objections except that such patents were not originals or certified copies.

**[Testimony of George P. Spangler, the Complainant,
on His Own Behalf.]**

GEORGE P. SPANGLER, complainant, was called as a witness on his own behalf and in response to questions by Mr. Blakeslee testified as follows:

My name is George P. Spangler. I am 47 years old and reside at Los Angeles, Cal. I am by occupation a leather workman and belt manufacturer and have been engaged in that [26] line of work 25 years. I am the complainant in this suit. I now produce a copy of the letters patent sued on herein. Said letters are offered in evidence and marked "Complainant's Exhibit 'A,' Spangler Patent." I am the sole owner of said letters patent. Prior to commencing this suit I sent a letter through the U. S. mail by registered letter to the Modern Sales Agency of America. This is a copy of the letter I sent. Said copy was offered in evidence and marked "Exhibit 'B'; letter of notification." This letter was sent to 114 East 9th St., Los Angeles, Cal. I received a return register receipt which showed the receipt of the letter on _____ by the Modern Sales Agency of America by E. R. Fries.

I commenced to make the buckles described in my letters patent about April 1st, 1910, and I first sold such buckles about June, 1910. I now produce a belt

(Testimony of George P. Spangler.)

buckle with the transverse bar broken out centrally. Here is such a buckle. I made it. The buckle is offered in evidence and marked Complainant's Exhibit "D," altered Spangler Buckle.

The first buckles like Exhibit "C" I made in the latter part of May, 1910, and put them on the market in June, 1910. I sold them at 221 West Second Street, Los Angeles, Cal. I have continued to sell them since. There was an increased demand for them for a year and a half after I first put them on the market. My average sales from the first of the year 1912 to the present date, March 22, per month has been $46\frac{1}{2}$ per cent less than they were for the previous 18 months.

This is a buckle that I bought August 2, 1912, at F. B. Silverwood's. I purchased another one similar to the buckle just produced on March 18, 1913, at F. B. Silverwood's Spring Street Store, Los Angeles, Cal.

Mr. BLAKESLEE.—I will ask defendants' counsel if they are prepared to admit that these buckles just produced by the witness are specimens of buckles which at times have been manufactured and sold by the defendants or either of them.

Mr. HARPHAM.—We will admit that these buckles are specimens of buckles which were at one time manufactured and sold by the defendant, Fresno Monogram Adjustable Buckle Company, in Los Angeles County, California, since October 18, 1910, and prior to the filing of this suit, but state that they are not now being manufactured.

(Testimony of George P. Spangler.)

(The two belts and buckles are marked as "Complainant's Exhibit 'E,' Defendants' Buckle," and "Complainant's Exhibit 'F,' Defendants' Buckle," respectively.)

Prior to the purchase of these buckles I had seen others like them in the market. Prior to the time I placed my buckle or buckles like "Complainant's Exhibit 'C' " on the market I had never seen a buckle having a plate or shield outwardly exposed or presented with the two ends of the strap or belt engaged together behind [29] the plate or shield by means of a member on one end of the belt engaging with a member adjustable connected with the other end of the belt, such engagement being between a slotted tongue on one belt-end and means connected with the plate and permitting adjustment between the plate and the other end of the belt.

I first met Mr. Bliss between the 20th and 27th of April, 1910.

I went up to Mr. Bliss to have him manufacture some buckles for me as he is a manufacturing jeweler, for samples from the patterns and models that I furnished him. I think this small paper device I have here was mentioned incidentally. I told him that it wasn't very good because it didn't curve to the body; it was rather cumbersome and I think he got a little huffy about that; said it was made exactly according to pattern, so we let it go at that. I had him make twenty buckles constructed the same as Complainant's Exhibit "C," except in reference to width, one size being a little wider than the other and some little

(Testimony of George P. Spangler.)

difference in finish and decoration. I paid for the buckles. I met Mr. Bliss frequently after that. We had many discussions or conversations pertaining to the manufacture of these buckles. He was very much impressed with this buckle Exhibit "C." He says, "A fine thing; I could sell those like hot cakes; college boys will be crazy for that." Another time he says that we have been working for years trying to get up a buckle, but that is the finest thing I ever saw. Then after a certain length of time he said he had a similar idea. I showed him my patent application on it and from that time on Mr. Bliss was very different, didn't work cheerfully helping me with the buckle from that time on. He says, "You mean to tell me you can get a patent on that?" I says, "I certainly applied for a patent on that." He never mentioned the fact that he had ever seen anything similar at all. I endeavored to sell buckles like Exhibit "C." Approximately the total sale of these buckles from the beginning to the present time is somewhere near 700. The selling price of these buckles has not always been the same. I [30] reduced the price on them. I made several little reductions that I have no recollection of, but the first of the year 1912, I made a 16 $\frac{1}{4}$ per cent reduction on them because my sales were getting less and I did it as an inducement to induce people to buy my buckles.

(The small paper device in two parts to which witness has referred is offered in evidence as "Complainant's Exhibit 'H,' Paper Model.")

I have seen buckles like Complainant's Exhibits

(Testimony of George P. Spangler.)

“E” and “F” on sale at approximately every gent’s furnishing store that I have seen lately in Los Angeles. I have used one of the buckles like Complainant’s Exhibit “C” with belt attached thereto. It is the most pleasant feeling belt I ever wore; the easiest to manipulate of any belt I ever wore. I am partly in business for myself and partly not. I am employed by Arnold Ross in Los Angeles. The employment is regulated to suit my pleasure. I give him as much of my time as suits my pleasure; the rest is my own. I have not any considerable capital to employ in the manufacture and introduction of these buckles. I had no inclination to put any great amount of money or capital or induce anyone else to put capital into my patent as long as the others were on the market as they had already the market covered and it would be an uphill fight to crowd them out.

Mr. Walter B. Bliss made something over seventy buckles for me in all, I guess. About November 1st, 1910, he notified me he couldn’t make any more for me, but he did make some more by having them ordered through Mr. Ross. He made some of these buckles after the issuance of the patent in suit.

On cross-examination the witness was interrogated by Mr. Harpham and testified as follows:

If you remove the interlocking element of my buckle which has the hook on the end of it there surely is nothing to hold the shield to the strap. The whole of that interlocking element is [31] necessary in a construction of that kind. The hook on the end of it is necessary as a holding device to hold the strap to the shell. The pin of it can extend up

(Testimony of George P. Spangler.)

through and be used for the same purpose, if there is any object in doing so, any desire to shorten or simplify it a little. The hook could be done away with—that whole plate on that pivot could be done away with and the hinge itself; a piece of wire with a few bent places in it would answer the same purpose. There could be a little stud sticking up there. The stud on this hooked interlocking element is naturally a necessary part of that in order to hold the belt.

Anything playing loose which would be without that stud necessarily naturally wouldn't work at all, that is, part of it is the holding device for the belt. That stud is the holding part for the belt, and the hook is the interlocking element for what engages the other interlocking element. It is not necessary—does not have to be that shape at all; it can be various shapes. It could be one continuous piece of metal. I never saw one that had interlocking elements that connected the ends of the belt together back of the shield. I had been in a position to see everything that was in that line, as that was my line of business for the last twenty-five years, and I have never seen anything similar whatever.

On redirect examination by Mr. Blakeslee the witness testified:

The service of the stud or projection or pin at the inner portion of the swinging member connected with the plate is it holds the belt from slipping, from allowing the buckle to slide, and is connected with the shield by a hinge or knuckle. The swinging member is connected with the buckle by the same hinge.

[Testimony of Paul W. Gilbert, for Complainant.]

PAUL W. GILBERT, produced as a witness on behalf of the complainant, was examined by Mr. Blakeslee and testified as follows:

My name is Paul W. Gilbert; I am 22 years old and at the present time am engaged in the grocery business. I reside at Los Angeles, California, and am acquainted with Mr. Spangler, the complainant. I have known him a little over eight years. I [32] first saw a buckle like Exhibit "C" about three or three and a half years ago. I sold a number of these buckles for Mr. Spangler at retail, with the Arnold Ross Trunk Company of 221 West 2d St., Los Angeles, Cal.

I know the defendant Walter B. Bliss. I first met him about five years ago. The first time that I went up to Mr. Bliss was to get him to make that shell buckle that Mr. Spangler and I got up together. The paper model, Complainant's Exhibit "H," is the shell buckle that I refer to. I told him to make a buckle like that for my personal use. He made one and I wore it. That was before I saw Exhibit "C." Right after that Mr. Spangler showed me a buckle like Complainant's Exhibit "C" and asked me if I thought it would sell and I said it certainly was very nice. Mr. Spangler had Mr. Bliss make the first ones for him. I got Mr. Bliss to make up samples for Mr. Spangler. Mr. Bliss seemed to think the buckles like Complainant's Exhibit "C" were very nice. I remember talking the buckle over with him and he seemed to think it very nice; in fact, being in-

(Testimony of Paul W. Gilbert.)

terested in it I would naturally ask him what he thought about it. He said it was very nice. He afterwards told me he had got out a buckle like that before. He said he had one like that himself. This was long after the buckle had been on the market. I should say about three months. At that time he did not have such buckle, but a little while afterward he did. The buckle that Mr. Bliss showed me at the time referred to is like this one, but this is somewhat perfected.

(Witness picks up "Complainant's Exhibit 'E,' Defendants' Buckle.")

The difference in that buckle he showed me was that the tongue slipped in between the two pieces of leather and were fastened on with glove-buttons. This part here was eliminated. (Witness points to the short ear projecting over the end of the strap behind the plate and between the two cross bars.) I have [33] seen them on sale in a number of stores of the improved type, in Los Angeles. Mr. Bliss told me he was going to put them on the market. At one time he wondered whether it infringed or not; of course I didn't know anything about it. I said of course Mr. Spangler is the originator of that particular patent. Then he wondered what he could buy Spangler's patent for, so I went to him and asked him about it, asked him what he would do. Nothing was said for some little time. He said something about selling it out to a company. I said that was rather an unfair thing to do; he ought to work Spangler's patent in with his in the company. He said that if

(Testimony of Paul W. Gilbert.)

I didn't say anything about it till after he got a company and then he would work in Mr. Spangler's patent. After the time Mr. Bliss first showed me the buckle which you have compared with Complainant's Exhibit "E" he did not say anything more only he was wondering whether it infringed or not—after he made up quite a few of these buckles he asked me if I thought I would buy belts from Spangler to help put his buckles on the market.

Approximately I should think I sold for Mr. Spangler pretty close to one thousand buckles like Exhibit "C." I have used one of these buckles and it is very satisfactory.

[Testimony of Herman A. Ross, for Complainant.]

HERMAN A. ROSS, a witness produced on behalf of complainant, was examined by Mr. Blakeslee and testified as follows:

My name is Herman A. Ross. I am a merchant by trade and live at the Shrine Apartments, Los Angeles, California. My age is 42 years. My line of business is trunk, baggage and suitcase line. I know complainant. He is an employee of mine and I sell his buckles and belts as much as possible. Complainant's Exhibit "C" is the buckle referred to. I first commenced selling such buckles two and one-half or three years ago and have sold them ever since. We used to get \$2.00 for a buckle like that; now we get \$1.15 for the buckle. The price changed about Sept. last fall. Prior to handling Exhibit "C" I have seen buckles with a plate [34] that is snapped over but nothing that is slid underneath that

(Testimony of Herman A. Ross.)

and fastened in the way that Exhibit "C" is fastened, that is slid behind the plate. I have been handling carved leather belts from 1892 to about seven or eight years ago and then dropped out of the carved leather belt line and went more into suitcases. The business of selling the Spangler buckles and belts seemed to drop off a little about a year ago this present spring. I don't know just what the cause was, though. The purchasing public seemed to like the buckle but most of them objected to the price. That was the drawback.

**[Testimony of George Sidney Binckley, for
Complainant.]**

GEORGE SIDNEY BINCKLEY, produced as a witness on behalf of the complainant, being examined by Mr. Blakeslee, testified as follows:

My name is George Sidney Binckley. I reside at Ocean Park, California. I am 42 years old and by occupation a Consulting Engineer.

Witness stated facts as to previous occupation and familiarity with machinery to qualify him as a mechanical expert and defendants conceded that witness was a mechanical expert.

(Witness continuing:) I have familiarized myself with the patent in suit and describe the device disclosed in the patent as follows: The device consists essentially of the plate forming the face and sides of the buckle or clasp, a hook attached to the plate, a stud engaging with the strap or belt, a bar from flange to flange of the plate or body of the buckle, and a spring tongue attached to the other end of the

(Testimony of George Sidney Binckley.)

belt or strap adapted to engage with the hook which is attached to the plate or body of the buckle. I believe those are the essential parts of the device. In addition, of course, we have the means for securing the spring tongue to the end of the belt. All the parts described except the plate or shield are on the rear side of this plate, all are concealed by the plate or by the belt to which the plate is attached. [35]

The end of the belt to which the belt or shield is attached lies upside of and overlapping the end of the belt to which the spring tongue is attached. I qualify that answer by saying that as shown the end of the belt to which the shield is attached could lie altogether behind the plate or shield itself. The arrangement of the belt and buckle parts other than the plate, rearwardly of the plate or shield permits of the adjustment of the length of the belt by passing it behind the plate or shield to whatever point is desired and securing it to such desired position by the stud. The use and function of the plate or shield would be primarily a support for the interlocking elements of this device and to confine the belt to a position in which it is locked to the plate or shield. The plate or shield, aside from the functions described is, of course, an ornamental feature and in that way may be decorated or given an initial as shown, or anything of that kind. The function of the transverse bar referred to as extending between the flanges of the plate or shield is merely to hold the spring tongue described in its proper relation to the plate or shield and the end of the belt passing under said plate or

(Testimony of George Sidney Binckley.)

shield. When the spring tongue is in engagement with the interlocking member upon the plate I don't see that the transverse bar has any function to perform. In the construction shown in this patent any disturbing stresses might produce, in the absence of the transverse bar, a disengagement of the perforated end of the belt with the plate or shield through the stud holding the belt in its position.

As between Complainant's Exhibit "C" and Complainant's Exhibit "A" there exists a very close similarity; in fact, the two are practically identical. The spring tongue is provided with two lugs bent down at right angles to the spring tongue itself, these lugs passing through slots in the end of the belt and being prevented from being pulled out of these slots by a cotter or split pin passing through both lugs behind the belt; there is also attached to the spring tongue a stud which passes through [36] a hole in the belt giving additional means of attachment of the spring tongue to the belt. This connection of the spring tongue with the respective end of the belt is a thoroughly permanent and positive mechanical connection. When the spring tongue is in engagement with the interlocking part carried by the plate or shield and extends between the transverse bar and the end of the strap or belt the transverse bar referred to would prevent disengagement of the interlocking elements so long as a strain was maintained to keep these parts in engagement. In Complainant's Exhibit "D," the plate or shield of this device is substantially the same as the corresponding parts shown

(Testimony of George Sidney Binckley.)

in Complainant's Exhibit "A" and Complainant's Exhibit "C," the only difference being that instead of a continuous bar extending transversely between the flanges of the plate or shield two lugs are provided extending a short distance inwardly from each flange; aside from this slight difference I find no divergence between exhibits "D," "C" and "A." The substitution of the spaced ears or prongs of Complainant's Exhibit "D" for the continuous transverse bar of Complainant's Exhibit "A" and "C" makes no functional difference whatever; the function is precisely the same in each case and is equally well performed with the continuous bar or with the lugs or prongs described.

The part designated "10" is essentially a hook forming part of the interlocking pair of elements; "13" is a stud, the function of which is to prevent movement of the end of the belt behind the plate or shield and hold it in its proper relation to this plate and the rest of the mechanism. The stud "13" in the exhibit as shown is connected through the swinging hook designated as "10," this hook being pivoted to the flanges of the plate or shield in such a manner that by swinging it away from the plate or shield the stud "13" is disengaged from the belt. "15" is the spring tongue referred to before; its function is to engage the hook "10" so as to hold the end of the belt to which the spring tongue "15" is attached in its proper relation to the [37] buckle or clasp as a whole.

When the tongue "15" is engaged with the hook

(Testimony of George Sidney Binckley.)

plate "10" no effect is produced upon the stud "13." No movement of the hook plate "10" is permitted without movement of the stud "13." The essential elements in the two devices exhibits "A" and "C" and "E" seem to be the same. In the Complainant's Exhibit "E" we have the plate or shield; we have a transverse bar joining the two flanges oppositely rearwardly upon the face of the plate or shield; we have another transverse bar which seems to occupy the same position and to perform the same function as the bar on which the swinging hook of the Complainant's Exhibit "C" is mounted and we have the spring tongue which is "C" in Complainant's Exhibits "A" and "C." The manner of engagement of the spring tongue with the plate or shield is direct in Complainant's Exhibit "E," while in Complainant's Exhibit "C" it is through the swinging hook "10." The hole of attachment of the spring tongue in Complainant's Exhibit "E" seems to be substantially the same as that shown in Fig. 5 of Complainant's Exhibit "A," although the serrated edges shown in Fig. 5 of Complainant's Exhibit "A" do not appear to have been used in connecting the spring tongue of the Complainant's Exhibit "E" with the end of the belt. There is in Complainant's Exhibit "E" a small lug the function of which I am unable to fathom. The mode of attachment of the loose end of the belt to the plate or shield in Complainant's Exhibit "E" is by a stud engaging with a hole in the belt, the stud in this case being attached direct to the back of the shield or plate. Those are the only

(Testimony of George Sidney Binckley.)

differences that I can observe. This stud of Exhibit "E" which is fast to the rear side of a shield or plate has a cut or notch on each side of it near the edge adapted to engage with the V-shaped perforation in the spring tongue; aside from this I don't observe any peculiarity in the construction of this stud. The nature of engagement of the stud with the [38] spring tongue in Complainant's Exhibit "E," due to the peculiar formation of the stud, might be described as positive; it is a positive engagement as a hook is a positive engagement; this is also a positive engagement. When you compare the method of such engagement with the nature of the engagement of the hook plate "10" in Complainant's Exhibit "A" and "C" with the tongue "15," there is certainly no functional difference. I am unable to see any practical difference in the nature of the engagement; both devices depend on the maintenance of a certain amount of tension on the belt to keep the two interlocking parts in engagement; both are released by taking off such tension; both are positive not depending on friction. I don't think it would be improper to say that both might be described as a hook engagement. The function of the stud in retaining the end of the belt in its proper relation to the plate or shield is precisely the same in both cases. In the case of Complainant's Exhibit "E" this stud performs the double function of retaining the end of the belt in the proper relation with the plate or shield and engaging with the spring tongue attached to the other end of the belt. Considering the swinging tongue "10" in

(Testimony of George Sidney Binckley.)

Exhibit "A" as being integral with, or a single piece, the stud "13," this single piece is the equivalent of the stud attached to the rear of the plate or shield in Exhibit "E."

The function of the spring tongue is the same in each case as far as I can see. The bar "9" carrying the hook "C" in Exhibit "A" performs the double function providing support for this swinging hook and retaining the belt in its proper relation behind the shield or plate. In Exhibit "E" the transverse bar performs the same function of retaining the belt in its position. The function of the other transverse bar shown in Complainant's Exhibit "E" is to retain the spring tongue in position behind the belt when engaged with the stud. I have used the terms "hook," "hook-like" or "hook engagement" to convey the impression of engagement of two interlocking parts of such a character as to require maintenance of tension on these parts to retain them in their engagement one with the other. I consider this to be the essential characteristic of hook engagement. [39]

The function of the lugs in Complainant's Exhibit "D" is the same as the function of the corresponding lugs in Exhibit "F" and of the bar in the corresponding position on exhibit "E." There is, of course, a mechanical difference in the arrangement of these parts. Considering simply the hook itself with the spring tongue of Exhibit "A" and "C" and the grooved lug and spring tongue of exhibit "E," I should say they are mechanically equivalent. There is no difference between the function of the stud of

(Testimony of George Sidney Binckley.)

Complainant's Exhibits "A" and "C" and the stud of Complainant's Exhibits "E" and "F" with respect to holding the free end of the belt to the plate or shield. In conclusion I wish to state with respect to the functions and uses of the buckles constituting Complainant's Exhibits "A" and "C" and Complainant's Exhibits "E" and "F" that there is no functional difference in any of the essential elements of the exhibits.

For the complete disengagement of the tongue from the stud and through it the plate or shield, a movement of the tongue longitudinal to the stud is necessary. I would say, however, that where the engagement is complete with the sides of the V-shaped slot bearing into the kerfs on the side of the stud, two movements are necessary to effect disengagement, the same as in other types of hooks, one being transverse to the axis of the stud, the other longitudinal to its axis; the first being to disengage the sides of the V-shaped slot from the kerfs, the second to free the tongue from the stud and allow it to be withdrawn. This same movement in effect is necessary for any other style of hook that I have in mind. The classes of relative movements entering into disengagement of the spring tongue from the hook in Complainant's Exhibits "A" and "C" and the classes of relative movements entering into disengagement of the spring tongue from the stud in Complainant's Exhibits "E" and "F" are the same in each case. Now, in either Complainant's Exhibits "C" and "E" and "F," if the spring tongue be applied to the inter-

(Testimony of George Sidney Binckley.)

locking part and slid in under pressure over that interlocking part until the opening in [40] the tongue receives the interlocking part and then the direction of the movement of the parts be reversed they will enter into a position of engagement one with the other, and under such conditions whether the spring quality of the tongue will be asserted depends upon the detail of the construction of these devices; a very slight change of the position of these parts in relation to each other would change the result. With the spring quality present in these tongues and the tongues slid along the inter-engaging parts under pressure until the inter-engagement takes place, the spring quality during the progress of the inter-engagement apparently will enter into the inter-engagement in Complainant's Exhibit "C" as constructed, while it apparently does not in exhibits "E" and "F." I will supplement that by saying that the spring quality of the tongue seems to exist in exhibit "C" as before described in holding the belt into contact with the plate or shield, while in exhibit "F" no spring quality seems to enter into the engagement or function of this tongue, and in exhibit "E" the spring function is apparently limited to the entrance of the spring tongue into engagement with the hook. I wish to explain that these differences are such and the differentiation is so slight between these exhibits that they might be accidental or intentional. All have certain inherent spring quality, but this spring quality is not the same in exhibits "E" and "F." There is more in "E" than

(Testimony of George Sidney Binckley.)

there is in "F." It appears to be the difference in the metal employed and the shape of the metal as formed. Now, if each of the tongues of Complainant's Exhibits "E" and "F" is placed at its outer end upon the outer end of the stud so that the tongue is flexed slightly and the tongue is moved along the stud until the stud passes through the opening this flexion will be relieved if the opening in the tongue approaches and engages the stud. In connecting the tongue with the stud in bringing the ends of the belt together the tongue will probably be slid along the stud in engagement therewith.

This closes complainant's *prima facie* case. [41]

On April 3d, 1913, at 2 o'clock P. M., testimony was taken before Elmer L. Kincaid, a notary public in and for the County of Los Angeles, State of California, pursuant to notice and stipulation, and there were present Raymond Ives Blakeslee, counsel for complainant, and G. E. Harpham and C. W. Hoag, counsel for defendants. Witnesses were examined on behalf of defendants by Mr. Harpham.

[Testimony of F. E. Monteverde, for Defendants.]

F. E. MONTEVERDE, a witness produced on behalf of the defendants Fresno Monogram Adjustable Buckle Company and Walter B. Bliss, being first duly sworn, testified as follows:

My name is F. E. Monteverde. I am 63 years old and am by occupation a mechanical expert. I reside at Los Angeles, California.

In answer to questions witness qualified as a mechanical expert.

(Testimony of F. E. Monteverde.)

(Witness continuing:) I have seen the Spangler patent sued on in his action and have familiarized myself with the same. I have examined letters patent No. 132,051, issued to F. Busch, October 8, 1872, and I have familiarized myself with it and understand it.

Mr. HARPHAM.—I now offer in evidence the following United States letters patent, to wit: Patent to F. Busch, No. 132,051, issued October 8, 1872, and the same is marked “Defendants’ Exhibit 1, Busch patent”; patent to E. B. Koopman, No. 544,856, dated August 20, 1895, marked “Defendants’ Exhibit No. 2, Koopman Patent”; patent to E. Graves, No. 556,413, dated March 17, 1896, marked “Defendants’ Exhibit No. 3, Graves Patent; patent to M. T. Goldsmith, No. 577,850, dated March 2, 1897, marked “Defendants’ Exhibit No. 5, Goldsmith Patent”; patent to C. E. Mixer, No. 672,793, dated April 23, 1901, marked “Defendants’ Exhibit No. 4, Mixer Patent”; patent to E. G. Latta, No. 205,715, dated July 2, 1878, marked “Defendants’ Exhibit 6; patent No. 1,034,681, to W. B. Bliss, dated August 6, 1912, marked “Defendants’ Exhibit No. 9, Bliss Patent.” [42]

Mr. BLAKESLEE.—The offer of the Bliss patent is objected to as not coming within the pleadings of this case and as not being set up in the defence in the answer of either of the defendants, and is irrelevant, incompetent and immaterial and on other grounds. The offer of each of the other patents as exhibits on behalf of the defendants is also objected to on the

(Testimony of F. E. Monteverde.)

ground that the same are not identified, and no foundation laid for their offer and introduction as exhibits in this case, and therefore as incompetent.

Mr. HARPAM.—They are offered as showing the state of the art and for the purpose of anticipating the patent sued on, the Spangler patent, and if not anticipating the patent, then for the purpose of limiting the patent to the specific construction of parts, as shown and described in the patent sued on.

Mr. BLAKESLEE.—Any such showing which these patents may have is a matter entering into the disclosures of the patents themselves when properly presented for consideration.

Mr. MONTEVERDE (Resuming).—Now, referring to the Spangler patent and the Busch patent, “Defendants’ Exhibit 1,” each buckle has a shield or plate provided with rearwardly disposed bars spaced therefrom. In the Spangler patent the shield is marked 6 and the bar 8. In the Busch patent the shield is marked A and the bar b. Big A and the bar small b. In the Spangler patent bar 8 is held by the side flanges turned up from the face of the shield, and in the Busch patent, the bar b is held by lugs; also on the back of the shield. Both have holding means for connecting the shield with the strap shown in both drawings. In the Spangler patent the holding means is a stud marked 13. This stud is on the shank of the interlocking springing tongue 10. In the Busch patent the holding means are the retaining hooks shown as a, which are shown in the drawing. Both patents have interlocking elements,

(Testimony of F. E. Monteverde.)

one of which is connected to the shield and the other to the end of the strap. In the Spangler patent the interlocking element [43] which is connected to the shield is a spring tongue, 10; this tongue having a hook 12, on the end thereof and a stud 13 thereon; and the other interlocking element is a spring tongue 15, which has a transverse elongated slot 19. This elongated slot occurs in the outer end which allows the curved lip or hook 12 of the springing tongue to pass into engagement with the end of the springing tongue 15.

In the Busch patent the interlocking elements are the bar, marked b, already mentioned, and the hook d, which hook attaches over the bar b. I have examined exhibits "E" and "F." With a slight modification in the construction they are both practically alike, substantially the same one with the other. Both of these exhibits have a shield, has the same construction practically as the Spangler and Busch patents. They also have a stud connected to the back of the shield at the front end of the shield by means of which the free end of the belt is detachably and adjustably connected to the shield. In this respect they are identical with the Busch patent except that Busch uses two curved studs or hooks, substituting them for the single stud in the other one. The elements in this construction I do not find in the Spangler patent. Another method of uniting the two ends of the belt, that is to say, these two exhibits, in their method of uniting the two ends of the belt, they differ from both Spangler and Busch.

(Testimony of F. E. Monteverde.)

These exhibits both have a tongue which has a longitudinal slot broader at the end nearest the point where it is secured upon the end of the belt and narrowest toward the other end, and is attached upon the end of the belt. The manner of attachment to the end of the belt in this exhibit is shown by clamping over three triangular pieces that have been gouged from the plate proper and riveted over and clamped onto the end of the plate that holds it (witness points to Complainant's Exhibit "E") and in the other exhibit the clamping is practically the same, except in one case its clamps longitudinally and in the other one transversely, but the method of clamping is identically the same [44] in both. This tongue that I have described and shown in the exhibit is passed under lugs secured upon the side flanges of the shield, which lugs are secreted near the stud and then are passed over the stud itself, with the slot surrounding the said stud, that is, after the free end of the belt is on the stud.

It is the same on both. I am answering in regard to exhibits "E" and "F," referring to Complainant's Exhibits "E" and "F." In this construction these exhibits "E" and "F" are different from both the Spangler and the Busch patents. In the Busch patent the hook d hooks over the bar b, thus holding the ends of the belt together. In the Spangler patent the stud 13, and the tongue 10, to lock the belt, this tongue 10 must be passed into the free end of the belt and the spring tongue 15 is then passed under bar 8, and the transverse slot 19 permits the

(Testimony of F. E. Monteverde.)

end thereof to snap into engagement with the hook 12 on the end of tongue 10. Now, these kerfs on the studs of both the above-mentioned exhibits are for the purpose of allowing the stud to slide a little further in the slots, and to keep the tongue from longitudinal movement as to the axis of the stud when in contact with the sides of the stud when within the kerfs. They also serve as a safeguard to keep the tongue from slipping longitudinally on the stud. Were these kerfs omitted, the engagement and holding capacity would be just as great in one sense, but not in the other; that is to say, omitting the kerfs the tongue might be subject to longitudinal movement as to the axis of the stud, and therefore more likely to come off the stud accidentally. This would not occur by the use of the kerfs.

By Mr. HARPAM.—I now show you a buckle which we ask to have marked Defendants' Exhibit 10, which is identical in construction with exhibit "F," with the exception that there are no kerfs in the side of the stud, and ask that it be marked Defendant's Exhibit 10 in connection with the testimony just given by the witness. [45]

Mr. BLAKESLEE.—We object to the offer of this exhibit with any statement as to its construction or its construction in comparison with Complainant's Exhibits "E" and "F." Let the witness compare this device with the other exhibits; let the testimony be adduced in that manner.

(The buckle last referred to is marked Defendants' Exhibit No. 10.)

(Testimony of F. E. Monteverde.)

(Witness resuming:) Exhibit 10 differs from exhibit "F" in that the holding stud already described is a plain stud without any kerfs.

Referring to the engagement between the tongues in exhibits "E" and "F" with the studs in those exhibits I would describe the interlocking device not as hooking the parts together or connecting them by hooking one upon the other, but more as a button and button-hole engagement, the stud representing the button in the case and the triangular shaped slot representing the button-hole.

Mr. HARPHAM.—You may cross-examine.

On cross-examination by Mr. Blakeslee the witness testified:

Now, in Defendants' Exhibit 10 the shield has two lugs on to which and between the inner face of the belt and the lugs the tongue is held in place. These lugs are in such position that they confine the outer end of the tongues. They are nearer to its outer end. The inner end of the tongue is free to play along the stud when loose like exhibits longitudinally. I call the mode of inter-engagement of the stud on the tongue in this exhibit 10 a positive locking inter-engagement as made, to withstand a longitudinal, you may say, or lateral movement, but it is not as positive a locking engagement as where the kerfs are employed on the stud as in Complainant's Exhibits "E" and "F." The use of these kerfs produces a much more effectual and positive interlocking engagement. A button-hole in order to enable the button to be passed through it in either direction must be pliable

(Testimony of F. E. Monteverde.)

in most cases. I find no pliability in the tongue of Complainant's [46] Exhibits "E" and "F," which would permit it to materially yield so that the ends of the studs outwardly of the kerfs can be disengaged with the tongues by bending the material. The material is metallic and rigid.

Referring to Defendants' Exhibit 1, Busch Patent, the holding means on the free end of the belt is not engaged with the hook or studs, a, or with any hook or part on or directly connected with that stud. They engage the hooks and the hooks project below the shield inwardly. One end of the belt is connected with the hook, a, and the other end of the belt is hooked on to the transverse bar b, and these hooks a, are not connected with the bar b, not directly; they are both connected and form part of the shield A.

They are both independently connected with the shield A. Bar b, is connected by means of ears or lugs projecting below the shield, and the hooks, a, form part and parcel of the shield itself, either by soldering or other manner of attaching so both have one common base in attaching to this shield. When the hook b is engaged with the bar d, it is not engaged with or passed beneath any other transverse bar or transversely projecting ear on the shield or plate. The hooks a are at points remote from the hook d, when the same is engaged with bar b. By remote I mean that there is a separating space between them. You could entirely remove the hooks a, or the transverse bar b, with-

(Testimony of F. E. Monteverde.)

out in any way transforming or affecting the other and the other would still remain in position for use, but I can't imagine what the utility of a thing of that kind would be there. There would be no locking means to utilize the shield as a belt or buckle.

In Complainant's Exhibit "A," if you remove the hook 10 you also remove the stud 13. In Complainant's Exhibit "E" and "F," if you remove these studs you remove both the means for holding one end of the belt to the plate, and also the means for detachably engaging the buckle with the other end of the belt. [47]

[Testimony of Frank Waterfield, for Defendants.]

FRANK WATERFIELD, a witness produced on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HARPHAM.)

My name is Frank Waterfield; I am thirty years old; reside in Los Angeles, California, and am a draftsman by occupation.

I have been in the mechanical business for the last eighteen years in various factories around Rhode Island mostly; for the last three or four, possibly five years, I have been making drawings and helping make up specifications. I have seen the Spangler patent before and I have studied the matter over carefully and thoroughly understand it. I have seen the Busch patent before and have studied that carefully and thoroughly understand it.

The points of similarity and dissimilarity between

(Testimony of Frank Waterfield.)

the buckles described in the Spangler patent, the patent in suit, and the Busch patent are as follows: They both have a shield and a rearwardly disposed bar spaced therefrom. The bar on the Spangler patent is secured to the side members of the shield and the bar on the Busch patent is secured to lugs mounted on the back of the shield. Both have interlocking members, one of which is fastened to the shield and the other to the free end of the belt. In the Spangler patent the interlocking members consist of a springing interlocking hook 10, having a hook 12, on one end of it and a stud 13; and a spring tongue 15, having a traverse slot near the end of that fastened on to the free end of the belt. In the Busch patent the interlocking members consist of hooks fastened to the back of the shield and a hook that is fastened onto the free end of the belt, which hooks over the bar b, secured to the back of the shield. These buckles on exhibits "E" and "F" are substantially the same. There is a slight difference in construction, but for practical purposes they are the same. Exhibit "E" compares with the Spangler patent; they both have a shield, side members interlocking elements; the retaining members of the [48] Spangler patent consist of the swinging tongue 10 and the stud 13 as far as the shield is concerned, and on the exhibit "E" the retaining members consist of a stud that is secured at one end on the back of the shield. The interlocking elements consist in the Spangler patent of the swinging tongue 10, the stud 13 thereon and a

(Testimony of Frank Waterfield.)

hook that has a curved lip that curves rearwardly, and the spring tongue 15, that has got a transverse elongated slot near the end and this spring tongue is passed under the bar 8, and then is adapted to spring over and have a hooking engagement with the hook 12. In exhibit "E" the interlocking means consist of a bar which is similar to bar 8 in the Spangler patent, and the stud which also retains the belt—or rather secures the belt to the shield, and a tongue having an elongated slot that runs longitudinally of the tongue, and the largest end at a point where the tongue joins the belt and narrows down toward the other end. In the Busch patent the interlocking means consist of the bar b, which is disposed rearwardly from the back of the shield, and a hook d, which is secured to the free end of the belt and which hooks over the bar b. The belt is secured to the shield in the Busch patent by means of curved studs or hooks a, which are secured to one end of the shield. The function of those kerfs in exhibits "E" and "F" is to allow the spring tongue to slide further on the stud, and when the edges of the slot are in contact with the sides of the kerfs it prevents longitudinal movement of the locking tongue on the stud; that is, the longitudinal movement is as to the axis of the stud. The engagement and holding capacity of the stud in the tongue would be as great were these kerfs omitted as it is with the kerfs, but it would be more liable to slip off the stud longitudinally than if the kerfs were there; provided as a sort of

(Testimony of Frank Waterfield.)

safeguard against accidental disengagement. The engagement of the tongue with the stud in these kerfs is not a hooked engagement, [49] because in a hooked engagement, a hook is necessary in order to make the parts perform their function. Remove the hook and the engagement is gone. In the case of these exhibits, if you remove the kerfs, the engagement is still there.

On cross-examination by Mr. Blakeslee the witness testified as follows:

If the kerfs in Complainant's Exhibits "E" and "F" were removed there would be a positive interlocking engagement between the tongues and the studs. Such engagement would prevent movement between the tongues and the studs in more than one direction. While it is being worn I should say the friction of the slot on the stud would prevent longitudinal movement of the tongue on the stud. If the tension on the belt were eased up that frictional engagement would hold the parts against slipping unless the tension were very loose. When the kerfs are present it is a much safer engagement, and it positively prevents the tongue from playing or slipping along the stud longitudinally of the stud and becoming disengaged from the stud. As a matter of fact, I judge the kerfs on the studs in exhibits "E" and "F" are for the same purpose as the hooked end of the plate 10, in the Spangler patent. In the Busch patent those hooks a, really have no kerfs but the forwardly extending portion of the hooks would practically or might answer the same

(Testimony of Frank Waterfield.)

purpose as a kerf. A kerf is a narrow slot. Those hooks a, are not shown slotted in any respect. The hooks a, in the use of the Busch device are not in any manner engaged with the hook d, to interlock the parts together except through the medium of the belt. The hook d, is not a tongue with a slot as I see it, and in that respect it differs from the tongue of the Spangler patent buckle, and also the tongues of exhibits "E" and "F." In this Busch patent buckle there is no cross bar or inwardly projecting part or ear which engages with the tongue. [50] In the device of this Busch patent there are no extended flanges rearward of the plate A between which the tongue and the belt end are confined. The cross-bar b, is an element entirely distinct and separate from the hook a, but the bar b forms one of the interlocking elements. The bar b, and the hook a, are independently connected with the plate A, at separate points. In both the Spangler patent device and the Complainant's Exhibits "E" and "F" there are means projecting inwardly of the flanges and over or behind the spring tongues when the parts of the buckle are interlocked, and the spring tongues and one end of the belts in each instance lie between these bars or ears and the plate or body of the buckle. These transverse bars or ears thus confine the tongues and said belt ends between them and the body or plate of the buckle in each instance.

The foregoing is presented by appellants Walter B. Bliss and Fresno Monogram Adjustable Buckle Company as a condensed statement of the evidence,

the exhibits referred to herein being on file and hereby referred to and made a part hereof.

G. E. HARPHAM,

NEIGHBOURS, SPROULE & HOAG,

Solitors for Appellants.

Approved.

RAYMOND IVES BLAKESLEE,

Solicitor for Complainant.

**[Order Settling and Allowing Condensed Statement
of Testimony.]**

The foregoing statement of condensation of testimony is hereby settled and allowed under the order of the Court.

Dec. 15th, 1913.

OLIN WELLBORN,

Judge. [51]

[Endorsed]: 209—Civil. U. S. District Court, Southern District of Cal. G. P. Spangler, Pltff., vs. W. B. Bliss et al., Defts. Settled Abstract of Testimony. Filed Dec. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [52]

Complainant's Exhibit "A"—Spangler Patent.

G. P. SPANGLER.

CLASP OR BUCKLE.

APPLICATION FILED MAY 5, 1910.

972,937.

Patented Oct. 18, 1910.

Fig. 1.

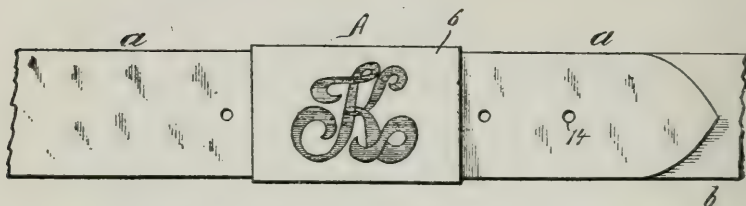


Fig. 2.

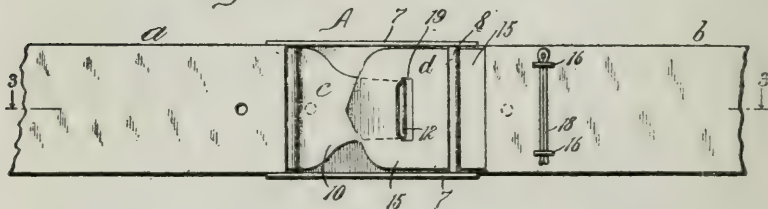


Fig. 3.

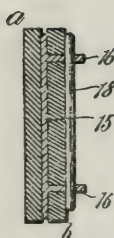
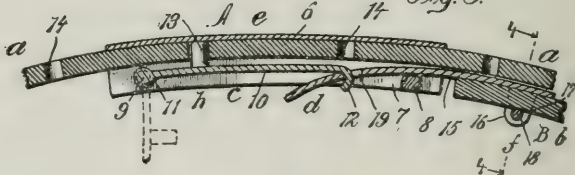


Fig. 4.

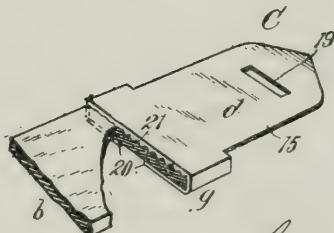


Fig. 5.

Witnesses

Wm. C. Curren
B. F. Fletcher

Inventor
George P. Spangler
By Robert C. Calkins
Attorneys

UNITED STATES PATENT OFFICE.

GEORGE P. SPANGLER, OF LOS ANGELES, CALIFORNIA.

CLASP OR BUCKLE.

972,937.

Specification of Letters Patent.

Patented Oct. 18, 1910.

Application filed May 5, 1910. Serial No. 559,625.

To all whom it may concern:

Be it known that I, GEORGE P. SPANGLER, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California; have invented new and useful Improvements in Clasps or Buckles, of which the following is a specification.

This invention relates to clasps or buckles, or similar adjustable connection and attachment devices; and it has for its object to provide improvements with relation thereto which will be superior in point of positiveness in operation, convenience in use and manipulation, facility in installation or connection, and disconnection, with respect to working position, relative simplicity and inexpensiveness in construction and general efficiency.

The invention has for its particular objects the provision of an improved clasp or buckle which will be more slightly in appearance and more conveniently manipulated, in service, than are devices of the same general character now customarily employed; and the use of which is attended by less injury to the belt or other device or object in connection with which it is employed.

The invention consists in the novel provision, construction, formation, combination and association of parts, members and features all as hereinafter described, shown in the drawings and finally pointed out in claim.

In the drawing:—Figure 1 is a front face view, or outer face view, of a clasp or buckle organized and constructed according to the invention and mounted upon and connected with a belt; Fig. 2 is a rear, or inner face view of the same; Fig. 3 is a longitudinal sectional view of the same, taken on the line 3—3, Fig. 2; Fig. 4 is a transverse sectional view, taken upon the line 4—4, Fig. 3, and looking in the direction of the appended arrow; the showing in this figure being turned into a position at an angle of ninety degrees to that shown in Fig. 3, and, Fig. 5 is an isometric view of a modified form of construction of a feature of the invention shown in Fig. 3, the same being shown in a position the reverse of that of the corresponding feature shown in Fig. 3.

Corresponding parts in all the figures are designated by the same reference characters.

Referring with particularity to the drawing, the improved clasp or buckle therein

shown as embodying the invention comprises two members or parts, A and B respectively, and a member C which is adapted for use in substitution for the member B. The said members A and B are shown as respectively applied to the end portions *a* and *b* of a belt shown fragmentarily in the drawing, the member C being also shown as attached to the end portion *b*, in Fig. 5, for use in substitution for the member B. The members A and B include or are provided with interlocking elements, *c* and *d* respectively, the member C having a similar element *d* for co-action with the element *c*. The member *c* is pivotally mounted upon a body *e* included within the member A; and the member *d* is shown in Fig. 3 as detachably connected with the belt end *b* by holding means *f*; whereas in Fig. 5 the member *d* is shown as permanently connected with the belt end *b* by holding means *g*.

h designates holding means for connecting member A with the belt end *a* in position of relative adjustment of the same; such holding means *h* being connected in common formation with the element *c*.

The body *e* preferably comprises a plate or shield 6 which may be given a longitudinal curvature proper to cause it to conform to the line of extension of the belt upon which the clasp or buckle is mounted, when said belt is placed around the body of the wearer. The particular conformation of said shield or plate will, it is to be understood, be predetermined by the nature of the service in which the belt and the clasp or buckle thereon are to be employed. The outer or front face of the plate or shield 6 may be ornamented in any preferred and suitable manner, an example of which is disclosed in Fig. 1. The plate or shield 6 is provided with spaced lateral flanges 7, both directed rearwardly from the plate or shield substantially rectangularly and adjacent to corresponding ends of said flanges the latter are connected by a cross-bar 8 which bridges the space between the flanges and connects the outer edge portions thereof. The opposite end portions of the flanges 7 are connected by a pin or bar 9 upon which is pivotally mounted the element *c*, the latter consisting of a metallic tongue or plate one end of which is formed into a knuckle 11 which pivotally embraces the pin or bar 9, and the other or outer end of which is provided with a curved or angular lip 12,

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said lip 12 being directed away from the plate or shield 6. Formed upon or connected with the tongue or plate 10 and projecting from the face thereof and next adjacent to the plate or shield 6, is a stud 13 suitably proportioned to enter and be accommodated by any one of the ordinary belt holes 14 formed in the end portion *a* of the belt, and constituting the holding means *h*. The element *d* comprises a plate or tongue 15 one end of which is provided with ears 16 projecting from the face thereof which is directed away from the plate or shield 6; the ears 16 being formed for projection through suitable openings in the end portion *b* of the belt, and being provided with transverse holes or openings 17 for the reception of a cotter pin 18, or equivalent device serving to detachably secure the plate 15 to the belt end portion *b*. The plate or tongue 15 is adapted to be attached by the holding means *f* to the belt end *b*, and is of such dimension longitudinally, that when the belt end *b* is brought substantially up to the end of the member *A* at which the cross-bar 8 is disposed, the tongue 15 may lie between the cross-bar 8 and the belt end *a*, which latter will lie directly rearwardly of the plate or shield 6, and so that the element *d* may coengage with the element *c*. To the latter end, the plate or tongue 15 is provided with a transverse elongated slot 19 for the reception of the lip 12 upon the plate or tongue 10; and the plate or tongue 15 is furthermore possessed of an inherent spring quality, and is formed with a longitudinal curvature, so that the outer end portion thereof rides over the lip 12, when the element *d* is passed between the belt end *a* and the cross-bar 8, causing the automatic inter-locking of the elements *c* and *d*. Furthermore, said elements may be disengaged one from the other by the passage of the thumb or finger behind the outer end of the plate or tongue 15, between said outer end and the plate or tongue 10, increasing the longitudinal curvature of or bowing the plate or tongue 15 free from the lip 12. As shown, the belt end *a* normally extends directly rearwardly or behind the plate or shield 6, and between the same and the plate or tongue 10, and overlaps the extreme end portion of the belt end *b*. The total operative length of the belt, or the degree of overlap of the end portions *a* and *b* thereof, is determined in accordance with the adjustment of the member *A* upon the belt end *a*; the member *A* and the belt end *a* being maintained in position of relative adjustment by the disposition of the stud 13 in the proper belt hole 14. And the member *A* is freed from the belt end *a* to enable such relative adjustment, by pivotally swinging the tongue or plate 10 constituting the

element *c* upon the pin or bar 9, so as to release the stud 13 from the belt hole 14 within which it lies; the position of said tongue or plate 10 resultant upon said pivotal movement being shown in dotted lines in Fig. 3.

Referring to Fig. 5, the holding means *g* shown therein as permanently connecting the element *d* consisting of the tongue or plate 15, with the belt end *b*, comprises integral ears 20 projecting laterally from the plate or tongue 15 and caused to embrace the edge portions of the belt end *b*, under compression; together with integral serrations 21 formed upon the inner end of the plate or tongue 15 and forced into the belt end *b*.

The holding means *f* are preferably employed when the clasp or buckle is to be used in connection with women's belts, sashes and similar articles of wearing apparel, which may be readily interchanged, as desired, in the selection of the same according to style, design or color; whereas the holding means *g* are preferably employed in connection with belts constituting portions of male attire and of the more durable materials, such as leather and canvas. The use of the holding means *f*, permitting ready detachment of the member *B* from the belt, also enables the wearer to interchangeably use a number of buckles or clasps embodying the invention, which may be variously designed, constituted or ornamented, as desired.

It is manifest that when the belt or other article to which the clasp or buckle is applied is fitted to the body of the wearer, or otherwise disposed in position of service, the only outwardly exposed portion thereof consists of the shield or plate 6, the wearing parts of the clasp or buckle, namely the inter-locking elements *c* and *d*, and the holding means *h* and *f* or *g*, being arranged rearwardly or inwardly of the plate or shield and the strap ends. It will furthermore be noted that the ends of the strap or belt, or other device, are maintained in flat formation, without any distortion such as accompanies the employment of the ordinary buckle tongue, and the life of the belt or strap is therefore extended.

A particular advantage attending the use of the improved clasp or buckle consists in the facility with which the inter-locking members thereof may be co-engaged, or disengaged each from the other. To co-engage the same as set forth, all that is necessary to do is to bring the belt ends together, one over the other, and pass the spring tongue 15 within the cross-bar 8 until the lip 12 enters the slot 19; and to disengage the spring tongue 15 from the plate 10 and the lip 12 thereon, it is only necessary to pass the thumb or finger between the plate or

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longue 10 and the spring tongue 15, at the outer end of the latter, so as to bend the spring tongue 15 sufficiently to release the lip 12 therefrom.

6 Having thus described my invention, I claim and desire to secure by Letters Patent:—

10 A clasp or buckle, comprising a shield or plate provided with a rearwardly disposed bar spaced therefrom, holding means for connecting the shield or plate with a strap or other device, inter-locking elements, one of said inter-locking elements being connected with said shield or plate rearwardly 15 thereof, and holding means for connecting the other of said inter-locking elements with

a strap or other device; one of said inter-locking elements consisting of a spring tongue adapted to be passed between said shield and said bar and being provided with an opening, and the other of said inter-locking elements being formed for hook engagement with said spring tongue through said opening. 20

In testimony whereof, I have signed my name to this specification in the presence of two subscribing witnesses. 25

GEORGE P. SPANGLER

Witnesses:

RAYMOND I. BLAKESLEE,
H. O. BOWSER.

Defendants' Exhibit No. 1—Busch Patent.

UNITED STATES PATENT OFFICE.

FLORIAN BUSCH, OF NEW YORK, N. Y.

IMPROVEMENT IN BUCKLES.

Specification forming part of Letters Patent No. 132,051, dated October 8, 1872.

To all whom it may concern:

Be it known that I, FLORIAN BUSCH, of the city, county, and State of New York, have invented a new and useful Improvement in Buckles; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification, in which drawing—

Figure 1 represents a longitudinal vertical section of my invention, showing the same when attached to strap or belt; Fig. 2 is an inverted plan of the same when attached to a belt; and Fig. 3 is a similar view of the same when detached.

Similar letters indicate corresponding parts.

This invention consists of a plate in imitation of a buckle, which is provided on its back with one or more retaining-hooks and with a cross-bar that prevents the retaining-hook or hooks from becoming disengaged, and also serves as a portion of the fastening device for connecting the two ends of a belt or strap, the whole being constructed in such a manner that the face plate of the buckle remains unbroken and conceals the entire fastening device; and furthermore, the strap or belt attached to my buckle is not injured in its appearance.

In the drawing, the letter A designates the face plate of an imitation buckle, to the under surface of which are secured one or more hooks, *a*, and also a cross-bar, *b*, which is, by preference, bent out as shown in Figs. 2 and 3, but which may be made in any desirable form or shape.

In attaching my buckle to a strap or belt, B, one end of said strap is provided with several sets of holes, *c*, Fig. 2, intended to receive the retaining-hooks *a* of the buckle. This end of the belt is passed through between the cross-bar *b* and the face plate A; and the retaining-hooks are made to catch in one of the sets of holes *c*. On the opposite end of the belt B is secured a hook, *d*, Fig. 1, which

can be made to catch over the cross-bar *b*, for the purpose of securing the two ends of the belt together.

In order to adjust the length of the belt or strap, the retaining-hooks *a* of the buckle are disengaged and moved into another set of the holes *c*, either up or down as the desired length of the belt may require. This operation can be effected very easily, and if the retaining-hooks have entered the holes *c* they are not liable to become disengaged spontaneously, since the cross-bar *b* is situated so close to the points of the hooks that the belt is not able to rise sufficiently to allow the hooks to drop out of the holes. The form of this cross-bar may, however, be changed to suit convenience and taste.

By these means a buckle is obtained, the face of which can be made of any desired shape, and ornamented in any desirable manner, while its face plate covers up and conceals the fastening devices; and furthermore, the fastening devices are so constructed that they produce no marks on the outer surface of the belt, and the length of the belt can be adjusted without impairing its appearance, while in ordinary buckles the belt, when strained, receives an impression in its face, and when the length of the belt is changed this impression becomes visible and spoils the appearance of the belt.

My buckle is cheap in its construction, convenient in its application, and economical in its use.

What I claim as new, and desire to secure by Letters Patent, is—

The face plate A, provided with a cross-bar, *b*, and one or more retaining-hooks *a*, combined substantially as described, and adapted to connect with a hook, *d*, as set forth.

This specification signed by me, this 29th day of August, 1872.

FLORIAN BUSCH.

Witnesses:

W. HAUFF,
E. F. KASTENHUBER.

Defendants' Exhibit No. 2—Koopman Patent.

THE MODEL.

E. B. KOOPMAN.
BELT ATTACHMENT.

No. 544,856.

Patented Aug. 20, 1895.

Fig. 1,

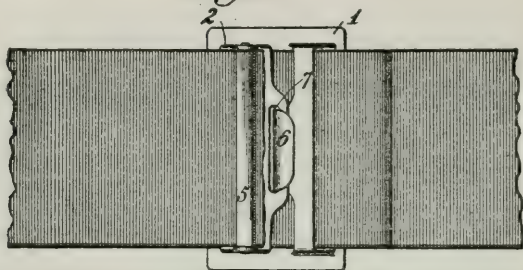


Fig. 2,

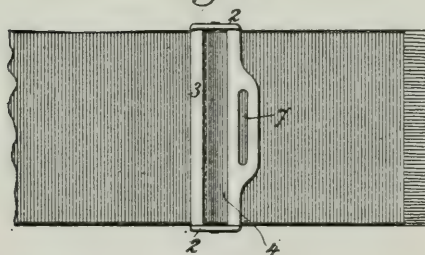


Fig. 3,

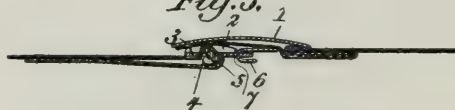
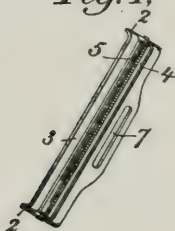


Fig. 4,



Witnesses:-

D. H. Raymond
L. H. Marble

Inventor:

Elias B. Koopman
 By *E. M. Marshall*
His Attorney.

UNITED STATES PATENT OFFICE.

ELIAS B. KOOPMAN, OF BROOKLYN, NEW YORK

BELT ATTACHMENT.

SPECIFICATION forming part of Letters Patent No. 544,856, dated August 20, 1895.

Application filed April 17, 1895. Serial No. 546,010. (No model.)

To all whom it may concern.

Be it known that I, ELIAS B. KOOPMAN, a citizen of the United States, residing at Brooklyn, in the county of Kings and State of New York, have invented certain new and useful Improvements in Belt Attachments; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention relates to attachments for belts or other similar bands, and particularly to adjustable slides or end pieces for belts; and my invention consists in the novel means provided of holding the belt within this slide or end piece, in the novel construction of the end piece, and in the novel form, construction, and arrangement of the parts thereof.

Belt-clasps usually consist of two metal pieces, mounted upon or secured to opposite ends of the belt and arranged to be fastened together by a hook or other suitable means. One of these metal pieces or attachments is usually a belt-plate, usually sewed or otherwise attached permanently to the belt. This belt-plate or belt attachment is usually provided with a hook adapted to engage with an eye or slot in the attachment upon the other end of the belt. This second belt attachment is usually loose upon the belt to permit of adjustment of the length of the belt, and consists of a metal plate, slotted to permit the belt to pass therethrough. It may properly be termed the "end piece" of the belt.

The end of the belt, after passing through the slot in this end piece, is usually attached to a slide mounted upon and free to slide along the belt, and by moving which back and forth the length of the belt is adjusted. In order that the slide may remain in place when once adjusted, and so keep the length of the belt constant, it is necessary that the belt-ribbon be sufficiently long so that it may be doubled backward for a considerable distance, the slide occupying a position well around the side of the wearer. It will be seen, therefore, that with the ordinary belt-clasp a belt-ribbon must be used which is considerably longer than is necessary or desirable, and there is considerable waste of material.

By my invention I combine the end piece and slide in one by providing an end piece arranged to grasp the ribbon and prevent it from slipping.

The objects of my invention are, first, to provide an end piece for belts arranged to grasp the belt-ribbon without injuring the same; second, to provide an end piece which, while arranged to grasp the belt, may be readily adjustable thereon; third, to provide an end piece through which the belt may be passed easily and readily, and which shall be so constructed that it is immaterial which side of this end piece may be outermost, thereby avoiding danger of putting the end piece upon the belt wrongly, and, fourth, to make this end piece strong, simple, compact, and easy of use with any of the ordinary belt-plates.

These objects are attained in the invention herein described, and illustrated in the drawings which accompany and form a part of this application, in which the same reference numerals indicate the same or corresponding parts, and in which—

Figure 1 is a rear view of a portion of the belt, showing upon one end thereof an ordinary belt-plate and upon the other end an end piece engaging with said belt-plate and constructed in accordance with my invention. Fig. 2 shows the end of a belt with my end piece thereon. Fig. 3 is a sectional view of a belt plate and end piece, showing the method of passing the fabric through the end piece. Fig. 4 is a detail perspective view of the end piece.

In the drawings, 1 is an ordinary belt-plate, which may be attached to the belt in any suitable and common manner.

2 is the end piece, consisting of a guard-plate 3, provided with a longitudinal slot 4, in which is pivoted a tongue 5, the ends of the guard-plate being upturned slightly and provided with apertures which form bearings for the end of the tongue. This tongue is placed in the center of the slot 4 and is pivoted about its own central axis. It is slightly narrower than the slot 4, and therefore may be freely revolved therein. The edges of the tongue 5 are serrated, preferably, to afford a better grasp on the fabric.

The belt-plate is provided with the usual

544,858

hook 6, adapted to engage with a corresponding slot 7 in the guard-plate. In placing my end piece upon the belt the end of the belt is passed through the slot 4 between the edges of the guard-plate and tongue 5, upon the side of the tongue farthest from the slot 7, and is passed through the slot 4 from that side of the end piece which is to be the inner side. Which side of the end piece is selected for the inner side is immaterial, as will be seen. The end of the belt is then passed over the tongue through the slot 4 between the edge of the guard-plate and the tongue 5, and this time on the side of the tongue nearest the slot 7. The end of the belt is folded back parallel with the main portion of the belt, this loose end being inside when the belt is worn. When the belt is passed through the end piece in this manner and is drawn tight, the strain upon the belt tends to turn the tongue 5 as nearly as possible parallel with the guard-plate 3, so that the fabric of the belt is pressed between the edge of the guard-plate and the edge of the tongue upon both sides of the tongue. This pressure is sufficient, so that the belt is held very firmly within the end piece. When the belt is loose it is easy to adjust the position of the end piece, and therefore the length of the belt, by simply sliding the end piece along the belt, which may be done without difficulty if the tongue be prevented from pressing the fabric too firmly against the guard-plate by holding the same at nearly right angles with the guard-plate with the finger. As soon as strain comes upon the belt, however, the tongue is caused to press the fabric against the edge of the guard-plate, and holds the same so firmly that it is impossible for the end piece to slip. It will be observed that with this end piece no separate slide attached to the end of the belt and sliding on the belt is necessary, nor is it necessary that the end of the belt shall be folded backward for a considerable distance, as is the case with the belt-clasps ordinarily used, a margin of an inch or less beyond the end piece being amply sufficient to prevent the end piece from slipping. When it is desired to use a slide upon the belt, however, for holding the end of the belt-ribbon, the belt attachment herein described may be used for that purpose, the slot 7 being long enough to receive the end of the ribbon. When my

belt attachment is so used, the end piece will ordinarily be a simple loop. The fact that the tongue 5 is pivoted at its central axis in the center of the slot 4, and that this tongue may be revolved completely around within said slot, makes it possible to have either side of the guard-plate turned outward. It likewise greatly facilitates the threading of the end of the belt through the slot 4 around this tongue.

Having thus completely described my invention, what I claim, and desire to secure by Letters Patent, is—

1. The herein described belt attachment, consisting of a guard plate slotted longitudinally, and a tongue pivoted in said slot, said guard plate and tongue being arranged to permit the ribbon to pass through said slot and between the edges of said guard plate and tongue, on both sides of said tongue, substantially as described.

2. The herein described end piece of a belt clasp, consisting of a guard plate slotted longitudinally, and a tongue pivoted in such slot, said guard plate and tongue being arranged to permit the ribbon to pass through said slot and between the edges of said guard plate and tongue on both sides of said tongue, and said guard plate being provided with means for attaching the same to the other end of the belt, substantially as described.

3. The herein described end piece of a belt clasp, consisting of a guard plate slotted longitudinally, and having a tongue pivoted through its central axis in the center of said slot, and revoluble therein, said guard plate being provided with means for attaching the same to the other end of the belt, substantially as described.

4. The herein described end piece of a belt clasp, consisting of a guard plate slotted longitudinally, and a tongue having roughened or serrated edges, and pivoted by its central axis in the center of said slot, said guard plate being provided with means for attaching the same to the other end of the belt, substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

ELIAS B. KOOPMAN.

Witnesses:

HARRY M. MARBLE,
JANDINE LYNG.

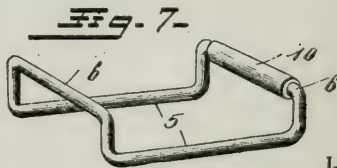
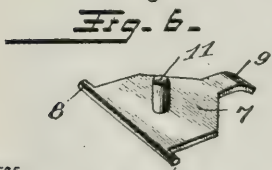
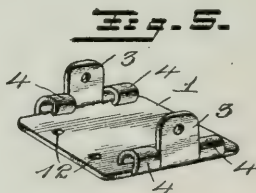
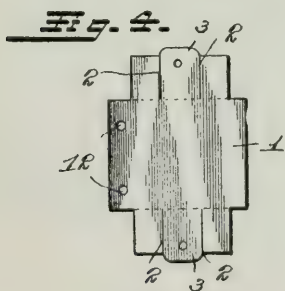
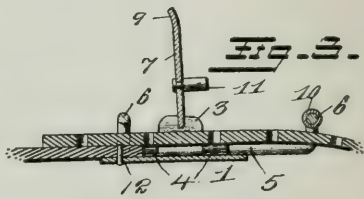
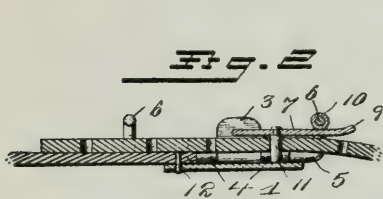
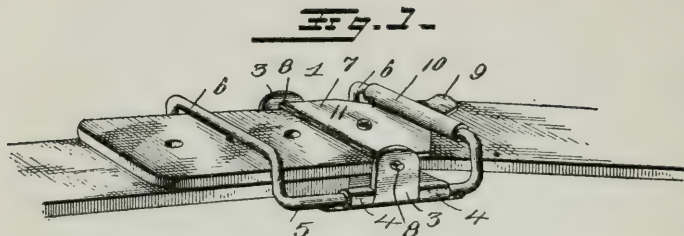
Defendants' Exhibit No. 3—Graves' Patent.

(No Model.)

E. GRAVES.
BUCKLE.

No. 556,413.

Patented Mar. 17, 1896.



Witnesses

H. J. Koerth.
R. M. Smith

By his Attorneys,

Inventor
Earl Graves,
C. A. Snow & Co.

UNITED STATES PATENT OFFICE.

EARL GRAVES, OF KOKOMO, INDIANA.

BUCKLE.

SPECIFICATION forming part of Letters Patent No. 556,413, dated March 17, 1896.

Application filed October 15, 1895. Serial No. 565,777. (No model.)

To all whom it may concern:

Be it known that I, EARL GRAVES, a citizen of the United States, residing at Kokomo, in the county of Howard and State of Indiana, have invented a new and useful Buckle, of which the following is a specification.

This invention relates to an improvement in buckles, and the object in view is to provide a simple, inexpensive, and convenient article of the character referred to, in which a simple locking device is employed, whereby the accidental escape of the tongue from the eye of the strap with which it is in engagement is rendered impossible.

In order to accomplish the object above referred to, the invention consists in certain novel features and details of construction and arrangement of parts, as hereinafter fully described, illustrated in the drawings and finally embodied in the claims.

In the accompanying drawings, Figure 1 is a perspective view of the improved buckle having strap ends secured thereto. Fig. 2 is a longitudinal section taken through the same in line with the tongue, showing the parts in their operative position. Fig. 3 is a view similar to Fig. 2, showing the pivoted tongue-plate thrown back, leaving the strap end free to be removed. Fig. 4 is a plan view of the blank from which the buckle-frame is formed. Fig. 5 is a detail perspective view of the buckle-frame. Fig. 6 is a similar view of the pivoted tongue-plate. Fig. 7 is a similar view of the sliding duplex loop.

Similar numerals of reference designate corresponding parts in the several figures of the drawings.

Referring to the accompanying drawings, 1 designates the buckle-frame, which in the present instance is made from a single sheet-metal blank, approximately square or rectangular in plan, and having parallel slits 2 cut in its side edges, as shown, and forming at each side three small flaps, the intermediate ones of which are bent at substantially right angles to the main body of the buckle-frame and perforated to form bearing-ears 3, which receive the end trunnions or journals of the pivoted tongue-plate, hereinafter described. The remaining flaps upon each side of the perforated ears 3 are bent or curved inward and downward in substantially semi-

circular form to constitute spaced guide-eyes 4, which are adapted to receive the opposite parallel arms of a duplex sliding loop 5.

The duplex sliding loop 5 comprises substantially a rectangular open frame of wire in which the opposite longitudinal arms or bars are arranged in parallelism and slidably mounted in the guide-eyes 4 of the buckle-frame. This slide-loop has its opposite ends deflected substantially at right angles to its side bars so as to locate the transverse end bars 6 at such distance from the buckle-frame as to permit the strap ends to pass between the main body of the buckle-frame and such transverse bars of the slide-loop. This particular construction and arrangement also serve to limit the sliding movements of the duplex loop in each direction.

7 designates the pivoted tongue-plate, which is preferably stamped from a piece of sheet metal and formed in such process with laterally-extending studs or trunnions 8, which enter the perforated ears of the buckle-frame and pivotally connect said tongue-plate therewith, and said plate is further provided with a longitudinally-extending spring-finger 9, which curves slightly away from the tongue-frame and is adapted to be received beneath a roller or sleeve 10, surrounding the transverse bar at the forward end of the slide-loop, when the parts are in operative or locked position. The tongue 11 is riveted or otherwise rigidly connected to the central portion of the plate 7.

The buckle hereinabove described is connected permanently to one end of a strap by means of threads or rivets passing through perforations 12 in the buckle-frame, or in any other convenient manner. The strap end to be temporarily held within the buckle is inserted between the main body of the buckle-frame and the double slide-loop, while the pivoted tongue-plate is thrown back. The desired eye in the strap is then brought into a position near the tongue-plate and the latter is then swung inward so as to project the tongue through the eye of the strap. This being done the duplex slide-loop is drawn back until the sleeve of the forward transverse bar thereof passes over and engages the forwardly-projecting spring-finger of the pivoted tongue-plate, whereupon said slide-loop

will be prevented from accidentally sliding forward through the medium of such spring-finger.

From the foregoing description it will be seen that an extremely simple, inexpensive and durable buckle is formed, and that the same requires in its construction the use of but two small pieces of sheet metal and a single section of wire, while at the same time a thoroughly efficient and reliable buckle is produced.

Changes in the form, proportion and minor details of construction may be resorted to without departing from the spirit or sacrificing any of the advantages of this invention.

Having described the invention, what is claimed as new is—

1. In a buckle, the combination with the buckle-frame and the tongue-plate pivotally connected therewith, of a rectangular slide-loop having its side bars in sliding engagement with the buckle-frame and its end bars deflected laterally so that the strap may pass between the buckle-frame on the one side and both end bars of the loop on the other, whereby the slide-loop is adapted to engage and lock the tongue-plate, substantially in the manner and for the purpose specified.

2. In a buckle, a frame provided at opposite sides with guide-eyes, in combination with a slide-loop mounted to slide within said guide-eyes and provided with a transverse bar, and a tongue-plate pivotally connected with the buckle-frame and adapted to be engaged by said slide-loop, substantially as described.

3. In a buckle, a buckle-frame formed from a sheet-metal blank and having its opposite side edges slitted to form flaps which are bent over and constitute guide-eyes, in combination with a duplex slide-loop mounted to slide within said eyes and provided with front and rear transverse bars, and a tongue-plate pivotally connected with the buckle-frame and having an integrally-formed spring-finger adapted to be engaged by the slide-loop, substantially in the manner and for the purpose described.

In testimony that I claim the foregoing as my own I have hereto affixed my signature in the presence of two witnesses.

EARL GRAVES.

Witnesses:

ED MORROW,
T. C. McREYNOLDS.

Defendants' Exhibit No. 4—Mixer Patent.

UNITED STATES PATENT OFFICE.

CHARLES E. MIXER, OF BOSTON, MASSACHUSETTS.

CLASP.

SPECIFICATION forming part of Letters Patent No. 872,793, dated April 23, 1901.

Application filed September 4, 1900. Serial No. 28,885. (No model.)

To all whom it may concern:

Be it known that I, CHARLES E. MIXER, of Boston, in the county of Suffolk and State of Massachusetts, have invented certain new and useful Improvements in Clasps or Fasteners, of which the following is a specification.

This invention has relation to clasps or fasteners, and has for its object the provision of a device of the class named which may be employed for a variety of purposes and which is capable of ornamentation, so as to present a pleasing and ornate appearance when used for securing together the ends of an article of wear, such as a belt or garter or the detachable parts of a pair of suspenders.

In carrying out the invention I employ two members which are adapted to interlock at their meeting ends, one of said members being formed with an outer portion or plate which is adapted to cover and conceal the interlocking body portions of both members. The outer plate is thus adapted for the reception of filigree or for any other ornamentation that it may be found desirable to use.

Referring to the drawings, which represent one embodiment of the invention, Figure 1 represents in front elevation a clasp or fastener as in the form best adapted for use in connection with a belt or garter. Fig. 2 represents a rear view of the same. Fig. 3 represents a section on the line 3 3 of Fig. 1 with the members of the fastener interlocked. Fig. 4 represents a similar section that shows the members in the positions assumed by them when being detached.

Referring to the drawings, the members are designated as a whole by the letters *a* and *b*, respectively. The member *a* (which I term the "latch member" for sake of convenience) consists of a metallic plate curved in the direction of its length and having its front end bent obliquely downward and backward, as at *a'*, to form a wedge-shaped latch. At its side edges the member is provided with lugs or ears *a²* *a²* to receive the trunnions *c' c'* of the toothed lever *c*, by which the end *A* of the belt is attached to the under side of said member. The said member *a* is likewise provided with laterally-projecting ears or stops *a³* for a purpose to be described. The member *b* (herein termed the "catch member") consists of an elongated strip of sheet metal, which in

this particular embodiment of the invention is shown as bent upon itself to provide the outer plate *b'* and the base-plate *b²*. The said strip is formed of spring metal, so that when the two plates are separated they have a tendency to spring back to initial position with respect to each other. The outer plate *b'* is much longer than the base-plate *b²*, whereby it is adapted to overlap and cover the member *a* when said members are interlocked. The base-plate *b²* is bent obliquely upward and rearward at its end and then downwardly, as at *b³*, to provide a wedge-shaped catch to interlock with the bent end or latch *a'* on the member *a*. The said plate *b'* is bent in the direction of its length, so that the member *a* can fit snugly against its under side while the plate *b²* is by reason of the formation of the catch bent slightly away from the plate *b'*.

When the catch is resting against the plate *b'*, there is a V-space between them, into which the latch is inserted to wedge the catch outward until it slips behind the same, after which the end of the latch bears against the downwardly-bent portion of the catch and is held from disengagement so long as said members *a* and *b* are drawn or pulled in opposite directions. The plate *b'* of the member *b* bears yieldingly against the member *a* and holds the latch *a'* in engagement with the catch *b³*.

The plate *b'* is provided with the lugs *b⁴* at its edges near its rear end, which lugs correspond to those at *a²*, and in said lugs are journaled the trunnions *d'* of the toothed lever *d*, by which the end *B* of the belt is attached to the member *b*.

The base-plate *b²* is formed with the lugs *b⁵* at its edges between its ends, said lugs serving to guide the latch into engagement with the catch and also serving to prevent a lateral movement of the member *a* when engaged with the member *b*. Said lugs cooperate with the stops *a³* in preventing the member *a* from being inserted too far in the member *b*, as shown in Fig. 2.

I prefer to so construct the fastener that when the latch and catch are in engagement they lie substantially midway between the ends of the plate *b'* of the member *b* and also so that the lugs *b⁴* will cover the said parts and hide them from view.

In interlocking the members it is merely necessary to force the latch of member *a* between the catch *b*² and the plate *b'* of the member *b*, and to detach the said members the member *a* is swung about the catch *b*² as a fulcrum, causing the latch to force the plate *b'* outwardly or, in other words, to separate the plates *b'* and *b*² far enough to permit the latch to be moved out of engagement with the catch *b*². The said members may be separated, however, by grasping the outer end of member *b* between the thumb and forefinger of one hand and pressing the thumb of the other hand against the member *a* so as to bend the plate *b'* of the member *b* out from the plate *b*² far enough to permit the member *a* to be drawn rearwardly in a straight line outward while resting against the said plate *b'*.

It will be understood that in lieu of the levers *c* and *d* the members *a* and *b* may have other provisions for adjustably securing the ends of the belt or garter thereto. The provision of the elongated plate *b'* of the member *b* furnishes a broad surface, which may be ornamented to a high degree. The plate itself may be embossed or it may be filigreed to suit the individual taste of the wearer.

It is evident that the invention may be used for many purposes. In a minute form it may be employed as a dress-fastener in lieu of hooks and eyes or as a fastener for umbrella- straps, and in enlarged form it may be employed as a clasp for horse-blankets or in many other ways.

Having thus explained the nature of the invention and described a way of constructing and using the same, though without attempting to set forth all of the forms in which it may be made or all of the modes of its use, it is declared that what is claimed is—

1. A clasp or fastener comprising two members with interlocking ends, one of said members having an outer yieldingly-connected plate which completely overlaps and conceals the other member when the two members are interlocked, and holds the said members in interlocked engagement.

2. A clasp or fastener comprising two interlocking members, one of which consists of a plate having a latch on its end, and the

other of which consists of a base-plate having a catch on its end, and having an outer plate which yieldingly holds the latch in engagement with the catch and which is adapted to yield outwardly to permit disengagement or detachment of said members, said outer plate having ears which project beyond the end of the catch to guide the latch into engagement therewith.

3. A clasp or fastener comprising two interlocking members, one of which consists of a plate having a latch on its end, and the other of which consists of a base-plate having a catch on its end, and having an outer plate which yieldingly holds the latch in engagement with the catch and which is adapted to yield outwardly to permit disengagement or detachment of said members, said last-mentioned plate being elongated to cover and conceal the latch member when said members are interlocked.

4. A clasp or fastener comprising two interlocking members, one of which consists of a plate bent obliquely downward and rearward at its inner end to form a latch, and the other of which consists of a base-plate bent obliquely rearward and upward at its inner end to form a catch, and a yielding outer plate between which and the base-plate the latch member may be inserted, said outer plate being elongated to overlap and conceal the latch member, whereby a smooth surface is provided for ornamentation purposes.

5. A clasp or fastener comprising a latch member having a wedge-shaped latch at its inner end and a catch member having a wedge-shaped catch at its inner end, and having a yielding outer plate which holds the latch in engagement with the catch, and which is elongated to conceal the body portion of the latch member, each of said members having provisions located on its underface for attachment to the end of a belt or garter.

In testimony whereof I have affixed my signature in presence of two witnesses.

CHARLES E. MIXER.

Witnesses:

C. C. STECHER,
MARCUS B. MAY.

Defendants' Exhibit No. 5—Goldsmith Patent.

(No Model.)

M. T. GOLDSMITH.
BELT BUCKLE.

No. 577,850.

Patented Mar. 2, 1897.

Fig. 1.

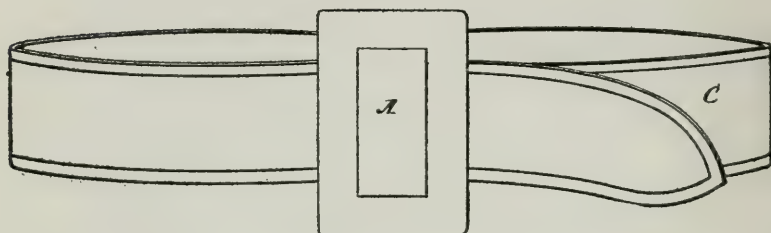


Fig. 2.

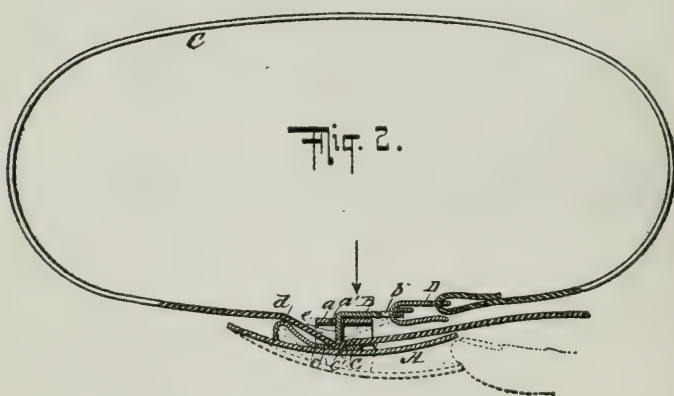
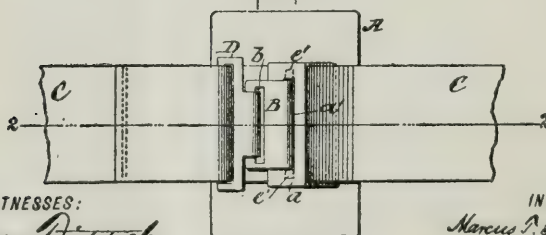


Fig. 3.



WITNESSES:

Gustave Dietrich, ch.
John Kehlbeck.

INVENTOR

Marcus T. Goldsmith,
 BY *H. A. West*

ATTORNEY.

UNITED STATES PATENT OFFICE.

MARCUS T. GOLDSMITH, OF NEW YORK, N. Y.

BELT-BUCKLE.

SPECIFICATION forming part of Letters Patent No. 577,850, dated March 2, 1897.

Application filed May 12, 1896. Serial No. 591,243. (No model.)

To all whom it may concern:

Be it known that I, MARCUS T. GOLDSMITH, a citizen of the United States, and a resident of New York, in the county of New York and State of New York, have invented certain new and useful Improvements in Belt-Buckles, of which the following is a specification.

My invention relates to a new belt-buckle in which the belt is adjusted by having one end thereof drawn through the main body or member of the buckle, the two main members of the buckle being constructed to firmly hold the belt without defacing the same and in such a manner that the belt may be released by pulling outward upon one edge of the main outer member or plate of the buckle.

Reference is to be had to the accompanying drawings, in which—

Figure 1 is a perspective view of a belt having my new buckle applied thereto. Fig. 2 is a sectional plan view of the belt and buckle on line 2 2 of Fig. 3, showing in dotted lines the method of releasing the belt from the buckle; and Fig. 3 is a rear elevation of the buckle and ends of the belt.

A represents the main plate or outer member of the buckle, B the inner or complemental member or clasp, and C the belt, one end of which is connected to the member B by a hook D, which enters a slot *b* in the inner member B or by being sewed or otherwise connected to said inner member.

The main plate or member A of the buckle may be of any desired ornamental design, outline, or configuration, and is curved, as shown in Fig. 2, to conform to the body of the wearer. It is provided at the back with a permanent keeper or loop *a*, in which a slot *a'* is formed, and beneath or in front of said keeper the main plate is formed or provided with ribs *c*, which are separated to form a narrow space or channel *c'* between their adjacent surfaces or edges, as shown clearly in Fig. 2. The plate A is also formed or provided at the back with a breast *d*, against which the belt acts by pressure of the body when on the person for automatically turning the plate A to the position shown in full lines in Fig. 2.

The inner member or clasp B is bent at an angle to form the jaw *e*, which latter is extended at its ends to form notches or shoulders *e' e'* for holding the part B in the slot *a'*,

as shown in dotted lines in Fig. 3. The jaw *e* is made of such width relative to the space between the keeper *a* and the back of the plate A or space *c'* therein that when the belt is in place and the outer portion of the member B closed down flat, as shown in Fig. 2, it will bend the material of the belt out into the space *c'* between the ribs *c*, as shown clearly in said figure, and thus hold the belt without injury. When the member B is in the said last-mentioned position and the belt is on the person, the sharp angle formed in the belt by the jaw and the said ribs causes the belt to be firmly held, and this position is maintained by the pressure of the belt against the breast-piece *d*.

When it is desired to remove the belt, it is only necessary to pull outward the edge of the plate A, as shown in dotted lines in Fig. 2, whereupon the rib *c* nearest said edge will swing around the edge of the jaw *e* and thus release the belt.

In adjusting the belt to make it more or less tight upon the body the wearer has simply to swing the plate A outward, as just described, and draw the belt through or let it slip back, as the case may be, and release the plate, whereupon the pressure on the breast *d* will automatically force the plate A back to its normal position, causing the jaw *e* to again firmly clasp and hold the belt, as above described.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. As a new article of manufacture, a belt-buckle comprising the main plate A, provided at the back with a keeper *a*, and the parallel ribs *b*, forming a channel coincident with the slot *a'*, in the said keeper, and having a breast-piece *d*, at one side of the keeper, in combination with the clasp B, fulcrumed in said keeper at a point in a plane intermediate of the said ribs *c*, and formed with a jaw *e*, of a width relative to the width of the space between the main plate and the keeper to adapt one of the said ribs to clear the edge of the jaw when the main plate A is moved slightly outward at one edge; substantially as described.

2. In a belt-buckle the main plate A, having the slotted keeper *a*, rigidly secured to

2

577,850

the back thereof and also having the parallel ribs *c c*, rigidly secured to the back of said main plate so as to form a channel coincident with the slot *a'* in the said keeper *a*, in combination with the clasp *B* fulcrumed in said slot *a'*, at points in a plane intermediate of the said ribs *c c*, and formed with a jaw *e*, of a width relative to the width of the space between the main plate and the keeper *a* to adapt the ribs *c* to clear the edge of the jaw when the main plate *A* is moved slightly outward at one edge; substantially as and for the purposes described.

MARCUS T. GOLDSMITH.

Witnesses:

H. A. WEST,
R. GUTHMAN.

Defendants' Exhibit 6, Latta Patent.

E. G. LATTA.
Trace-Buckle.

No. 205,715

Patented July 2, 1878

Fig. 1.

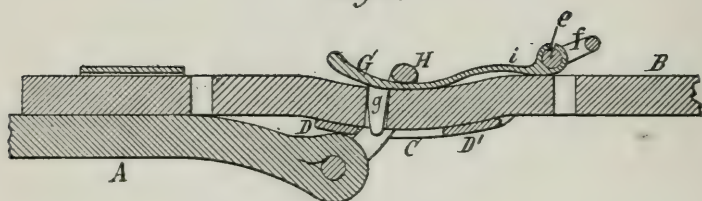


Fig. 2.

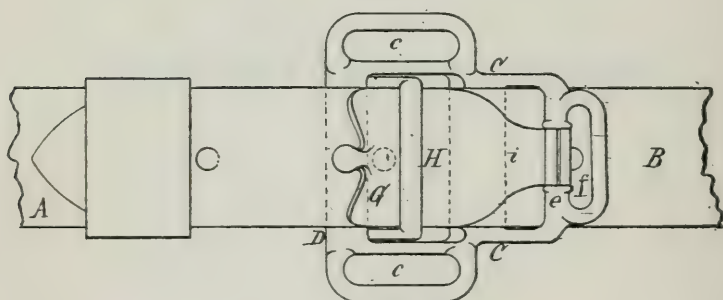
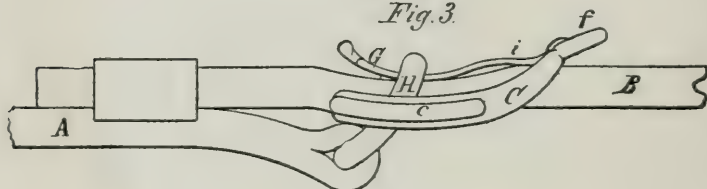


Fig. 3.



Charles J. Ruckbush
John Tyler } Witnesses

E. G. Latta Invented
by Wilhelm H. Bannard
Attorneys

UNITED STATES PATENT OFFICE.

EMMIT G. LATTA, OF FRIENDSHIP, ASSIGNOR OF ONE-HALF HIS RIGHT
TO HARVEY D. BLAKESLEE, OF BUFFALO, NEW YORK.

IMPROVEMENT IN TRACE-BUCKLES.

Specification forming part of Letters Patent No. 205,715, dated July 2, 1878; application filed
December 18, 1877.

To all whom it may concern:

Be it known that I, EMMIT G. LATTA, of Friendship, in the county of Allegany and State of New York, have invented a new and useful Improvement in Trace-Buckles, of which the following is a specification, reference being had to the accompanying drawings.

My invention relates to that class of trace-buckles in which a tongue-plate is employed, which is held in contact with the trace by a bail or loop attached to the hame-tug.

The object of my invention is the construction of a simple and strong buckle which permits the ready adjustment of the trace, relieves the tongue from strain, and the trace from undue compression, and which enables traces of different thicknesses to be used with the same buckle.

My invention consists of the particular construction of the device, as hereinafter fully set forth.

In the accompanying drawing, Figure 1 is a horizontal section of my improved buckle. Fig. 2 is a side elevation, and Fig. 3 a top-plan view thereof.

Like letters of reference refer to like parts in each of the figures.

A represents the hame-tug, and B the trace. C C represent the side bars of the buckle-frame, provided in the usual manner with loops *c c*. D D' represent the flat cross bars of the buckle, forming the back or bed of the buckle. The cross bars D D' are curved in the longitudinal direction of the buckle, as clearly shown in Fig. 1, so as to form an open concave bed for the trace.

e represents the upper rear cross-bar of the buckle, under which the trace passes, and *f* the loop formed with the cross bar *e* in the usual manner. G is the tongue-plate, hung with its rear end to the cross-bar *e*, and *g* the tongue formed on the under side of the plate G, near its front end. The tongue-plate G is made convex on its under side, so as to press the trace tightly into the open space between the two cross-bars D D', which form the concave bed of the buckle. The tongue-plate G is curved upward above the rear cross-bar D', as clearly shown in Fig. 1, to prevent

the plate from pressing the trace against this cross-bar.

H is the swinging bail hung to the rear end of the hame-tug A, so as to bear upon the tongue-plate G, the side pieces of the bail playing in recesses or depressions on the inner side of the side pieces C of the buckle. The rear end *i* of the tongue-plate, by which the plate is connected with the cross bar *e*, is cast with open jaws, so as to straddle the cross-bar. After annealing the parts the open jaws of the rear end *i* of the tongue-plate are applied to the cross-bar *e* and closed by pressure, forming what is termed a "cold shut," whereby the tongue-plate is securely connected to the buckle-frame in a very simple and durable manner.

The convex form of the tongue-plate G enables the buckle to hold traces of different thicknesses with equal security, which would not be the case with a flat tongue plate pivoted to the rear end of the buckle-frame. The convex form of the tongue-plate also serves to force the trace into the open space between the cross-bars D D', thereby securely holding the trace in place and relieving the tongue *g* to a great extent from the strain of the trace.

In my improved buckle the trace itself is not clamped at any point between two metallic surfaces, and thereby saved from undue compression and too rapid wear.

My improved buckle is readily and cheaply constructed of malleable iron, and very durable, and it is easily adjusted when in use.

I claim as my invention—

The combination, with the bail H attached to the hame-tug, of a buckle-frame provided with an open concave bed, D D', and the tongue-plate G *g* pivoted to the rear part of the buckle-frame and curved upward to clear the rear cross-piece D', and then curved down to press the trace into the open space between the cross-bars D D', substantially as and for the purpose set forth.

EMMIT G. LATTA.

Witnesses:

SAMUEL L. KING,
SAM'L. LATTA, JR.

Defendants' Exhibit No. 9, Bliss Patent.

W. B. BLISS.
BUCKLE.

APPLICATION FILED APR. 17, 1911.

1,034,681.

Patented Aug. 6, 1912.

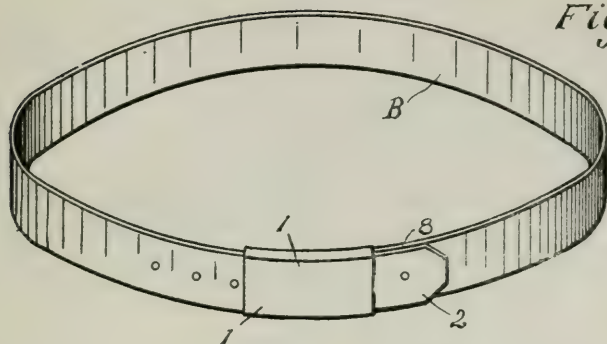


Fig. 1.

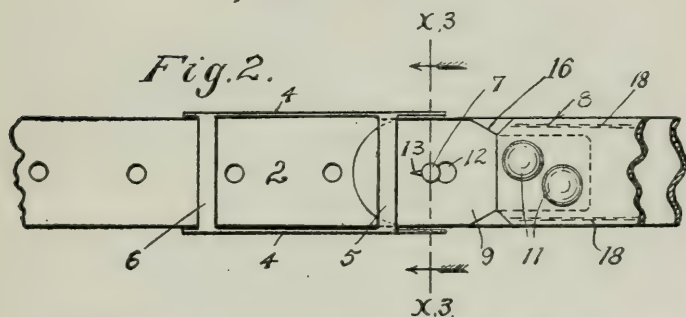


Fig. 2.

Fig. 3.



Fig. 4.



Fig. 5.

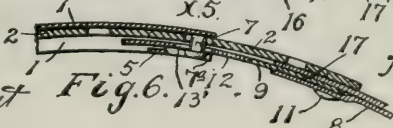
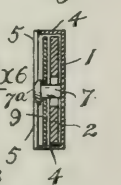


Fig. 6.

Witnesses:
H. N. Hunt
J. H. Gorman

Inventor:
Walter B. Bliss
Valbert H. Merrill
att'y.

UNITED STATES PATENT OFFICE.

WALTER B. BLISS, OF LOS ANGELES, CALIFORNIA.

BUCKLE.

1,034,681.

Specification of Letters Patent.

Patented Aug. 6, 1912.

Application filed April 17, 1911. Serial No. 621,687.

To all whom it may concern:

Be it known that I, WALTER B. BLISS, a citizen of the United States, residing in the city of Los Angeles, State of California, have invented a new and useful Buckle, of which the following is a specification.

Objects of this invention are to provide a very inexpensive and simple buckle adapted to be used for an ornamental belt buckle, and also adapted to serve as an improved article for the general uses to which buckles may be applied.

Referring to the accompanying drawings, which illustrate the invention, Figure 1 is a perspective view of a belt for use in connection with wearing apparel, provided with my newly invented buckle, showing the same in use as a means for connecting together the ends of the belt, the fastening parts not being moved quite to the fully fastened position; Fig. 2 is a view looking toward the inner face of the buckle and showing the end portions of the belt fastened to said buckle; Fig. 3 is a cross section on line x^x of Fig. 2; Fig. 4 is a view similar to Fig. 2 showing a modified form of the buckle; Fig. 5 is a cross section on line x^x of Fig. 4; Fig. 6 is a longitudinal mid-section on line x^x of Fig. 4.

In the structure disclosed, a buckle body 1 is employed, which is provided along its opposite side edges with rearwardly extending flanges 4, forming an open-ended guideway having an open rear side. Connecting the rear edges of the flanges 4 are transverse bars or keepers 5 and 6, the keeper 5 being located some distance from the adjacent end of the body. The said buckle body is preferably curved, as illustrated in Fig. 6. From said buckle body a stud 7 projects toward the side thereof which is provided with said keepers, said stud extending through the end portion 2 of the belt and being located in advance of the keeper 5 and spaced away therefrom a short distance, as shown. To the other end portion 8 of the belt is attached a plate 9, preferably by means of rivets 11. Said plate 9 has an aperture therethrough, said aperture having a larger portion 12 and a tapered or diminished portion 13 (or 13') projecting toward the end of said plate 9. The stud 7, in the form of the invention shown in Figs. 2 and 3, is recessed or cut away at each side at 14, as best shown in Fig. 3. The larger portion

12 of the aperture of the plate 9 readily passes over the stud 7, but the diminished portion 13 of said aperture may be drawn into contact with the diminished or grooved portion of the stud to fasten the parts together.

It will be understood that the end portion of plate 9 will first be obliquely inserted under the keeper 5, there being a slight space between said keeper and the section of the connection embraced by the clip 1, and the plate 9 will be brought down upon the stud 7 so as to bring said stud through the larger portion of the opening through the plate, and then the same may be brought into engagement with the contracted portion 13 of the opening to fasten the parts together.

The bar or keeper 5 is located at a little distance from the end of the clip 1, the stud 7 occupying an unobstructed position nearer the end of the clip. I am aware that it is not new to place a keeper on each side of the retaining stud, and my invention is an improvement over such a construction by reason of permitting the fastening elements to be more quickly coupled together, there being fewer parts to obstruct the quick fastening of the plate 9. By this invention, both the keepers are located on the same side of the retaining stud.

In Figs. 4 and 5 the stud 7 is shown provided with a head 7' which avoids the necessity of the recesses 14 shown in Fig. 3, and the aperture through the plate is not V-shaped, but is provided with a narrower portion 13' which passes astride the stud beneath the head thereof. It will therefore be seen that, in both forms of the invention, the stud is provided intermediate its base and outer end with a portion of diminished cross-sectional extent which the edges of the narrower portion of the opening through the plate 9 engage to keep the parts in the fastened position.

The belt is provided with a series of holes 15 to receive the stud 7. After the belt has once been adjusted by inserting the stud 7 through the desired hole 15, the belt may be put on and quickly fastened at the desired point without further adjustment.

The apertured plate 9 is desirably reduced in width at the points lettered 16. Said plate is thus provided with a tail-piece 17 which is narrowed down to pass between the

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1,034,681

stitching 18 and is riveted within the split end of the belt to give a neat appearance to the article.

I claim:

3. The combination with a buckle body comprising a plate having rearwardly extending flanges forming an open-ended guideway having an open rear side, a cross bar connecting the rear edges of the flanges and located in spaced relation to the adjacent end of the body, and a rearwardly extending stud located in the guideway between the cross bar and the said adjacent end of the body, of a belt having one end slidably
- 10 extending into one end of the guideway and provided with a series of openings, any one of which is arranged to detachably receive the stud and thereby adjustably secure the said end of the belt to the body, and a metal

plate secured to the other end of the belt, said plate adapted to be inserted behind the cross bar and over the first mentioned end of the belt, and said plate furthermore being provided with a socket or opening to coöperate with the end of the stud over the first mentioned end of the belt to lock the plate in place, and thereby secure both ends of the belt to the buckle body.

In testimony whereof I have hereunto signed my name in the presence of two subscribing witnesses at Los Angeles, in the county of Los Angeles and State of California, this 11th day of April 1911.

WALTER B. BLISS:

Witnesses:

ALBERT H. MERRILL,
LILLIAN YOUNG.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS et al.,

Defendants.

Stipulation [of Facts].

FOR INFRINGEMENT OF LETTERS PATENT.

It is hereby stipulated and agreed by and between the solicitors and counsel of the complainant and the defendants, Walter B. Bliss and Fresno Monogram Adjustable Buckle Company, that the defendant, Walter B. Bliss, is the patentee Walter B. Bliss of United States Letters Patent Number 1,034,681, for Buckles, issued August 6, 1912, on application filed April 17, 1911; that said letters patent are owned by the defendant Fresno Monogram Adjustable Buckle Company and were by it owned at the times that the buckles constituting the buckles of Complainant's Exhibit "E," Defendants' Buckle, and Complainant's Exhibit "F," Defendant's Buckle," exhibits in this case, and other such buckles, were manufactured and sold by the defendant Fresno Monogram Adjustable Buckle Company as admitted by said defendant on the record in this case; and that defendant Walter B. Bliss

made one or more of such buckles substantially as disclosed in said letters patent Number 1,034,681, and subsequent to the date of issuance of the Spangler patent in suit, and that said Bliss since the issuance of the Spangler patent in suit has been in the employ of, or by contract related with, or a stockholder in, said Fresno Monogram Adjustable Buckle Company, in connection with making and selling such buckles.

Dated April 15, 1913.

RAYMOND IVES BLAKESLEE,
Solicitor and Counsel for Complainant.
NEIGHBOURS, SPROUL & HOAG,
Solicitor and Counsel for Defendants.
WALTER B. BLISS,
G. E. HARPHAM,

Solicitor and Counsel for Defendant, Fresno Monogram Adjustable Buckle Company [70]

[Endorsed]: In Equity. No. 209—Civil. In the United States District Court, Southern District of California, Southern Division. George P. Spangler, Complainant, vs. Walter B. Bliss et al. Defendants. Stipulation. Filed Jul. 3, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Raymond Ives Blakeslee, Solicitor and Counsel for Complainant, 728-29-30 California Bldg., 2d St. & S. Broadway, Los Angeles, Cal. [71]

[Petition for Appeal.]

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS, FRESNO MONOGRAM AD-
JUSTABLE BUCKLE COMPANY, and
MODERN SALES AGENCY OF AMERICA,
LIMITED,

Defendants.

Walter B. Bliss and Fresno Monogram Adjustable Buckle Company, a corporation, two of the defendants in the above-entitled cause, considering themselves aggrieved by the Interlocutory Decree or order entered in said cause on August 4th, 1913, decreeing the letters patent sued on herein are valid and that defendants infringed the same and awarding an injunction and other relief, hereby appeal from said decree and decision and from the whole thereof to the Circuit Court of Appeals for the 9th Circuit for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed and that a citation issue as provided by law and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Cir-

cuit sitting at San Francisco, Cal.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

G. E. HARPHAM,

Solicitor for Fresno Monogram *Adjust* Buckle Company.

NEIGHBOURS, SPROULE & HOAG,

Solicitors for Walter B. Bliss. [72]

[Endorsed]: 209—Civil. U. S. District Court, So. Dist. Cal., So. Div. G. P. Spangler vs. W. B. Bliss et al. Petition for Appeal etc. Filed September 2, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [73]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS, FRESNO MONOGRAM ADJUSTABLE BUCKLE COMPANY, and MODERN SALES AGENCY OF AMERICA, LIMITED,

Defendants.

Assignment of Errors.

1. The Court erred in holding that there was a joint infringement by Walter B. Bliss, Fresno Mon-

ogram Adjustable Buckle Company and Modern Sales Agency of America, Limited, of the letters patent sued on in this action.

2. The Court erred in entering a decree in favor of complainant.

3. The Court erred in finding and decreeing that the letters patent sued on are good and valid in law.

4. The Court erred in finding and decreeing that the buckles exhibits "E" and "F" were an infringement of the letters patent sued on herein.

5. The Court erred in holding and finding that the anticipating patents did not constitute an anticipation of the claim of the patent sued on herein.

6. The Court erred in holding that the anticipating patents did not limit complainant's patent to the exact construction set forth therein and in the claim thereof and as so limited that the buckles exhibits "E" and "F" infringed said letters patent and the claim thereof.

G. E. HARPHAM,

Solicitor for Fresno Monogram Adjustable Buckle Co.

NEIGHBOURS, SPROUL & HOAG,

Solicitors for Walter B. Bliss. [74]

[Endorsed]: 209—Civil. U. S. District Court, So. Dist. Cal., So. Div. G. P. Spangler vs. W. B. Bliss et al. Assignment of Errors on Appeal. Filed September 2, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [75]

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS, FRESNO MONOGRAM AD-
JUSTABLE BUCKLE COMPANY, and
MODERN SALES AGENCY OF AMER-
ICA, LIMITED,

Defendants.

**Order Allowing Appeal and Fixing Amount of
Undertaking.**

In this action it appearing that the Modern Sales Agency of America, Limited, one of the defendants herein, has been duly notified to appear and join in the appeal of the other defendants to the Circuit Court of Appeals for the 9th Circuit and that said defendant has refused to join in the appeal. Now, on motion of the solicitors for the other defendants, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Interlocutory Decree heretofore entered August 4, 1913, on behalf of the defendants Walter B. Bliss and the Fresno Monogram Adjustable Buckle Company be and the same is hereby allowed as to their and each of their *interest* and that a certified transcript of such parts of the record, testimony,

exhibits and all proceedings herein as are specified as material be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, together with the mechanical exhibits. It is further ordered that the bond on appeal be fixed at \$250.00; to be filed within ten days and to be approved by the Court.

OLIN WELLBORN. [76]

[Endorsed]: No. 209—Civil. U. S. District Court, Southern District of California, Southern Division. G. P. Spangler, Compl't., vs. W. B. Bliss et al., Defts. Order Allowing Appeal and Fixing Amount of Bond. Filed September 2, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [77]

[Stipulation as to Record on Appeal.]

*In the United States District Court, Southern
District of California, Southern Division.*

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS et al.,

Defendants.

It is hereby stipulated that in making up the record on appeal in the above-entitled action the Clerk shall include in the record the following papers and no others, to wit:

The bill of complaint as amended to include the Fresno Monogram Adjustable Buckle Company.

The respective answers of the Fresno Monogram Adjustable Buckle Company and Walter B. Bliss.

The Interlocutory Decree.

The petition for and order allowing the appeal.

The assignment of errors.

The condensed statement of evidence as settled, together with all exhibits.

The stipulation of April 15th, 1913.

That in copying the above papers the headings of all documents except the bill of complaint shall be omitted and they shall be entitled as follows (heading omitted, being same as bill), and then give name of document.

All endorsements shall be as follows:

Service shall be "duly served" with the date.

Filing shall be "duly filed" with date of filing.

Dec. 26th, 1913.

RAYMOND IVES BLAKESLEE,

Solicitor for Complainant,

NEIGHBOURS, SPROUL & HOAG and

G. E. HARPHAM,

Solicitors for Defendants.

[Endorsed]: No. 209—Civil. U. S. District Court, Southern District [78] of California, Southern Division. George P. Spangler, vs. Walter B. Bliss et al. Stipulation as to Record on Appeal. Filed Dec. 26, 1913. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [79]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 209—CIVIL.

GEORGE P. SPANGLER,

Complainant,

vs.

WALTER B. BLISS and FRESNO MONOGRAM
ADJUSTABLE BUCKLE COMPANY,
Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventy-nine (79) typewritten pages, numbered from one (1) to seventy-nine (79), inclusive, to be a full, true and correct copy of the Bill of Complaint, Answer of Walter B. Bliss, Answer of Fresno Monogram Adjustable Buckle Company, Interlocutory Decree, Abstract of Testimony, Complainant's Exhibit "A," Defendants' Exhibits 1, 2, 3, 4, 5, 6, and 9, Stipulation of April 15, 1913, Petition for Appeal, Assignment of Errors, Order Allowing Appeal and for transmission of original exhibits, in the above and therein entitled cause, and that the same together constitute the record in said cause, as specified in the Stipulation as to the Record, filed in my office on behalf of the respective parties by

their attorneys of record; excepting therefrom Complainant's Exhibit "C," Spangler Buckle; Complainant's Exhibit "D," Altered Spangler Buckle; Complainant's Exhibit "E," Defendants' Buckle; Complainant's Exhibit "F," Defendants' Buckle; Complainant's Exhibit "H," Paper Model; Defendants' Exhibit 1, Buckle; Defendants' Exhibit 10, Buckle; which said original exhibits are by order of Court transmitted herewith and made a part hereof.

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I do further certify that the cost of the foregoing record is \$37 10/100, the amount whereof has been paid me by the defendants in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 13th day of January, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[81]

[Endorsed]: No. 2370. United States Circuit Court of Appeals for the Ninth Circuit. Walter B. Bliss and Fresno Monogram Adjustable Buckle Company, a Corporation, Appellants, vs. George P. Spangler, Appellee. Transcript of Record. Upon Appeal from the United States District Court for

the Southern District of California, Southern Division.

Received and filed January 14, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Extending Time to January 1, 1914, to File
Record on Appeal.]**

UNITED STATES OF AMERICA.

*District Court of the United States, Southern Dis-
trict of California.*

No. 209—CIVIL.

Clerk's Office.

GEO. P. SPANGLER,

vs.

WALTER B. BLISS et al.

Good cause appearing therefor, it is hereby ordered that the time for appellants W. B. Bliss and the Fresno Monogram Adjustable Buckle Co. to file the record in said cause on appeal and to docket said cause in the appellate court be and the same is hereby extended to January 1st, 1914.

October 14th, 1913.

OLIN WELLBORN,
Judge.

[Endorsed]: No. ——. U. S. Circuit Court of Appeals, Ninth Circuit. Walter B. Bliss et al., Ap-

pellants, vs. George P. Spangler, Appellee. Order Enlarging Time to File Record. Filed Oct. 17, 1913. F. D. Monckton, Clerk.

[Order Enlarging Time to February 1, 1914, to Docket Cause and File Record Thereof on Appeal.]

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

WALTER B. BLISS and FRESNO MONOGRAM
ADJUSTABLE BUCKLE COMPANY,
Appellants,

vs.

GEO. P. SPANGLER,

Appellee.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of February, 1914.

Dated at Los Angeles, December 24th, 1913.

OLIN WELLBORN,
United States District Judge, for the Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Walter B. Bliss et al., Appellants, vs. Geo. R. Spangler, Appellee. Order Extending Time to Docket Record. Filed Dec. 27, 1913. F. D. Monckton, Clerk.

No. 2370. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to February 1, 1914, to File Record Thereof and to Docket Case. Refiled Jan. 14, 1914. F. D. Monckton, Clerk.

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No. 2370.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Walter B. Bliss and Fresno Mono-
gram Adjustable Buckle Com-
pany, a corporation,

Appellants,

vs.

George P. Spangler,

Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

This is an appeal from an interlocutory decree awarding an injunction.

Appellee Spangler on November 4, 1912, filed his bill of complaint in the lower court against Walter B. Bliss, Fresno Monogram Adjustable Buckle Co., a corporation, and Modern Sales Agency of America, Limited, a corporation, defendants. The bill is in the usual form, charging that the defendants *jointly* infringed United States letters patent No. 972,937, issued to appellee Spangler October 18th, 1910, for a buckle for belts, hereafter called the Spangler patent. The Modern

Sales Agency made default and a decree *pro confesso* was entered against it. Defendant Bliss answered and denied infringing jointly or severally. The Fresno Monogram Adjustable Buckle Co., hereafter referred to and called the Buckle Co., answered and denied all the allegations of the bill and set up as an anticipation certain United States letters patent hereafter referred to. Testimony was taken and the cause was argued and submitted to the court for decision. The court decided the case in favor of appellee and entered its interlocutory decree holding that the patent sued on was valid and holding that *all* the defendants *jointly* infringed by the manufacture, use and sale of certain buckles and that they intend and threaten to continue such infringement, and awarded an injunction against the manufacturing of certain buckles. The defendants Bliss and the Buckle Co. duly filed their appeal from said interlocutory decree and assigned the following errors, upon which they relied for a reversal of the decree [found on pages 93 and 94 Transcript], to-wit:

ASSIGNMENT OF ERRORS.

1. The court erred in holding that there was a joint infringement by Walter B. Bliss, Fresno Monogram Adjustable Buckle Company and Modern Sales Agency of America, Limited, of the letters patent sued on in this action.

2. The court erred in entering a decree in favor of complainant.

3. The court erred in finding and decreeing that the letters patent sued on are good and valid in law.

4. The court erred in finding and decreeing that the buckles exhibits "E" and "F" were an infringement of the letters patent sued on herein.

5. The court erred in holding and finding that the anticipating patents did not constitute an anticipation of the claim of the patent sued on herein.

6. The court erred in holding that the anticipating patents did not limit complainant's patent to the exact construction set forth therein and in the claim thereof and as so limited that the buckles exhibits "E" and "F" infringed said letters patent and the claim thereof.

POINTS AND AUTHORITIES.

I.

The first assignment of error is in holding that there was a joint infringement by the defendants. There is no testimony whatever that the Modern Sales Agency of America ever made or used or sold any buckles of any kind or character or that they ever threatened so to do.

There is no testimony that the defendant Bliss made or used or sold any buckles in his individual capacity after the patent sued on was issued that were an infringement of said patent unless the making of one or more buckles substantially as disclosed in United States letters patent No. 1,034,681, issued to said Bliss August 6, 1912, for a buckle, constitutes an infringement. A stipulation as to the defendant Bliss' connection was entered into April 15th, 1913, and is found on pages 90 and 91 of the record. In said stipulation it is stipulated that Bliss is the patentee named in said

patent No. 1,034,681; that said patent was owned by the Buckle Co. at the time the buckles held to be an infringement of Spangler's patent were manufactured and sold by the Buckle Co.; that Bliss made one or more buckles substantially as disclosed in said patent No. 1,034,681, hereafter called the Bliss patent, since the Spangler patent was issued, and that since the Spangler patent was issued Bliss "has been in the employ of, or by contract related with, or a stockholder in said Fresno Monogram Adjustable Buckle Co., in connection with making and selling such buckles."

As the buckle made by Bliss was made in accordance with the United States patent issued to him, the presumption is that it did not infringe.

The granting of a patent for a device similar to the one covered by a prior patent is *prima facie* evidence that there is a substantial difference between the two.

Corning v. Burden, 15 How. 252, 14 L. C. P. 283;

Miller v. Eagle Mfg. Co., 151 U. S. 190, 38 L. C. P. 121-131;

Gillette Safety R. Co. v. Durham D. R. Co., 197 Fed. 575, and large number of authorities cited;

General Electric Co. v. Allis-Chalmers Co., 197 Fed. 558;

Byerley v. Standard A. & R. Co., 189 Fed. 759.

By no possible construction can said stipulation be construed to establish a *joint* making, or joint use, or joint sale of a buckle by Bliss in conjunction with the

other defendants. The stipulation does not establish the doing of any act by Bliss that constitutes an infringement of the Spangler patent. If the Bliss buckle could be held to be an infringement of the Spangler patent (which we submit it could not), Bliss' connection with the Buckle Co. as an employee or a stockholder in connection with the making and selling of such buckle would not render him liable to be sued individually. The making of one such buckle at some time after the issue of the Spangler patent and before April 15th, 1913, would not establish a right as against Bliss to an injunction. *Non constat* all the acts of Bliss set forth in the stipulation about making and selling such buckles may have occurred after the bill of complaint was filed and before April 15th, 1913. For these and other reasons urged on behalf of the Buckle Co. the interlocutory decree is clearly wrong as to defendant Bliss. It is also wrong as to all the defendants, because there was no *joint* infringement established. If the testimony discloses any infringement (which we contend it does not) it is a sole infringement by the Buckle Co., and that would not support a decree of *joint* infringement against all.

If a defendant has, before suit brought, abandoned the manufacture and sale of the infringing machine, and the court is satisfied that the abandonment was in good faith and final, the injunction ought to be refused and the bill dismissed.

Kennicott W. S. Co. v. Bain, 185 Fed. 520.

II.

The second error, that "The court erred in entering a decree in favor of complainant, and the third error, that "The court erred in finding and decreeing that the letters patent sued on are good and valid in law," and the fifth error, that "The court erred in holding and finding that the anticipating patents did not constitute an anticipation of the claim of the patent sued on herein," will be discussed under one head.

In discussing these errors it is of prime importance to ascertain what the invention set forth and covered by the Spangler patent is alleged to be and to determine whether there is any patentable invention set forth in the Spangler patent. A copy of the Spangler patent is found on pages 60 to 63 of the record. At folios 29 to 35, page 61, Spangler states his invention to "consist in the novel provision, construction, formation, combination and association of parts, members and features all as hereafter described, shown in the drawing and finally pointed out in the claim." Spangler describes his buckle as consisting of two members or parts, A and B, respectively, which are applied to the end portions of a belt. The part A comprises a plate or shield 6. This plate has lateral rearwardly extending spaced flanges 7 which are connected at the edges at one end by a cross bar 8. The other ends are connected by a bar 9. On bar 9 is mounted a plate 10 by a knuckle 11 which embraces bar 9. The outer end of plate 10 terminates in a curved lip 12 which forms a hook. On plate 10 is a stud 13 that projects toward shield 6 when in use. This stud enters a hole made in the end

of the belt and holds it from movement relative to the shield when the belt is worn and holds the end of the belt connected to the shield through the plate or tongue upon which it is mounted. The other element B consists of a spring tongue 15 secured to the other end of the belt. Tongue 15 has a transverse slot 19. Two methods of securing tongue 15 to the end of the belt are described. The manner of connecting the ends of the belt is to pass tongue 15 under bar 8 and over hook 12 until slot 19 registers with the hook, when the tongue springs over the hook and the parts are engaged. The claim covers the following elements: 1 A shield with a rearwardly disposed bar spaced therefrom 2 holding means for connecting the shield with a strap and 3 interlocking elements, one of said interlocking elements being connected with said shield rearwardly thereof, and 4 holding means for connecting the other interlocking element with a strap. Then follows a description of what these interlocking elements consist, as follows: "One of said interlocking elements consisting of a spring tongue provided with an opening adapted to be passed between the shield and bar, and the other interlocking element being formed for hook engagement with said spring tongue through said opening." [See claim, folio 8 *et seq.*, page 63.]

It will be observed that no claim is made for the rearwardly projecting flanges on the shield. In order to show that there was no novelty in the combination of parts specified in the claim certain United States patents were introduced in evidence. Spangler's first element is "a shield with a rearwardly disposed bar

spaced therefrom." Patent to Busch, 1872, found on pages 65-6, shows and describes a shield with a rearwardly disposed bar spaced therefrom. Spangler's second element is "holding means" for connecting the shield with a strap. Busch, Koopman, 1895 [p. 68], Mixer, 1901 [p. 76], and Goldsmith, 1897 [p. 80], all show holding means for connecting the shield with the belt. Spangler's third element is "interlocking elements, one connected to the shield and the other to other end of the belt." All of said patents show interlocking elements designed for and effecting the same purposes as Spangler's interlocking elements. It is true that the spaced bar and the interlocking elements of the Busch, Koopman, Mixer and Goldsmith buckles are different in form from Spangler's elements, but they are all designed for and accomplish the same purpose in substantially the same way as Spangler's buckle. The change in form made by Spangler does not rise to the dignity of invention. It is merely the skill of the expert mechanic. The shield of Mixer's buckle is ornamented. His interlocking parts are all back of and concealed by the shield when positioned for use. The same applies to Goldsmith. The Busch and Koopman shields can be ornamented and the interlocking parts are back of the shield. We ask, when these buckles are considered, where is there any invention in the Spangler buckle? That the court below did not give these patents due consideration is evidenced by its decision. Had these patents been given their due weight the decision must have been for the defendants.

In *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 3 L. C. P. 973, at p. 976, the court says:

“Doubtless, if the Boyd patent contained an invention entirely new, and first adapted to the end sought, such differences might be regarded as formal and evasive [differences between Boyd’s patent and Strickler’s patent, under which defendants manufactured their device]. (Brackets ours.) But coming as he did in the train of the numerous inventors that had preceded him, whose inventions had been patented and put into practical use, we must conclude that Boyd, if entitled to anything, is entitled only to the precise devices described and claimed in his patent. Of course, it follows that if the defendants’ specific devices are different from those of Boyd, no combination of such devices could be deemed an infringement of any combination claimed by Boyd.”

It is settled that a claim for a combination is not infringed if any one of the elements is omitted without substitution of an equivalent.

Union P. Bag M. Co. v. Advance Bag Co., 184 Fed. 126-138.

III.

Error 4, that “The court erred in finding and decreeing that the buckles E and F were an infringement of the letters patent sued on,” and error 6, that “The court erred in holding that the anticipating patents did not limit complainant’s patent to the exact construction set forth therein and in the claim thereof and as so limited that the buckles exhibits E and F infringed

said letters patent and the claim thereof," will be discussed together.

Counsel for appellee dwelt largely upon the spirit of the Spangler invention and asserted that exhibits E and F embodied that spirit. He also loudly declaimed over the iniquity of defendant Bliss acquiring the information that led to his making a buckle, for which the Patent Office granted him a patent, from the Spangler buckle. The granting of a patent to Bliss for his buckle is an adjudication by that department of the government entrusted with the business of issuing patents that the Bliss buckle is a different buckle from the Spangler buckle.

The two buckles in the formation of the parts have only a single element in common, which performs the same identical function in each, to-wit, the shield with the rearwardly projecting flange. The shield is shown to be old. The flanges are not claimed by Spangler, and, moreover, flanges, too, are old. The lugs a2 and b4 of Mixer are the full equivalent of the Spangler flanges. All the other elements of exhibits E and F are different in construction except the cross-bar of exhibit E and the lugs of exhibit F, but in said exhibits the bar and lugs do not perform the same offices as in the Spangler buckle. In the Spangler buckle the cross-bar is absolutely necessary. Appellee Spangler in his testimony [see lower half page 27] says of his buckle: "If the transverse bar were omitted it wouldn't work at all, the parts would work loose. The parts would become loose by working movement of wear." The bar of E and lugs of F merely serve as guides to register the slot in the tongue with the stud

on the shield. If the transverse bar of exhibit E and the lugs of exhibit F were removed the buckles would be as useful as before. In exhibits E and F the shield has a stud on the back thereof. In Spangler the stud is on one of the interlocking elements. In E and F the stud has small cuts in the sides near the end called kerfs. In Spangler there are no kerfs in the stud. In E and F the stud holds the shield attached to one end of the belt, and is one of the interlocking elements. In Spangler the stud holds the plate 10 or swinging tongue attached to the belt, but as plate 10 swings on a bar connected to the flange on the back of the shield it may be said that the stud holds the shield attached to one end of the belt. To accomplish this plate 10, bar 9 and the flanges on the back of the shield are necessary. Nothing is required or used in E and F to take the place of plate 10, bar 9 and the flanges to hold the shield to the belt end. The stud is soldered directly on the back of the shield, and it is located in a different place with respect to the transverse bar from the stud in Spangler's buckle. In Spangler one end of the belt is provided with a *spring tongue* 15 which has a transverse opening, in which opening a hook on the end of tongue 10 enters to fasten the belts' ends together, and this spring tongue must be passed under the transverse bar on the back of the shield or the buckle will not work, and after it is passed under the bar it must be engaged by the hook of tongue. This *spring* character of tongue 15 is an element of the claim and is especially dwelt upon in the specifications at folio 35, page 62, as follows: "Tongue 15 is furthermore possessed of an inherent spring quality, and is

formed with a longitudinal curvature, so that the outer end portion thereof rides over the lip 12 when the element d is passed between the belt end a and the cross-bar 8, causing the automatic interlocking of the elements c and d." In E and F the tongues on the ends of the belts do not have any spring quality except that of the metal. They do not ride over anything to make an automatic engagement. The slot is not transverse, but is longitudinal and tapered. These slots pass over studs on the backs of the shields. It is true that the ends pass under a bar in E and studs in F, but the bar and studs only serve as guides to register the slots with the studs on the backs of the shields. The bar and studs are only conveniences. Remove them and the buckles will work equally well. To keep the tongues of E and F against moving longitudinally on the stud within certain limits kerfs are cut in the sides of the studs near the ends, and the outer ends of the longitudinal slots are narrower than the diameter of the studs, and the tongues slide back on the stud in these kerfs, so that to disengage the parts the tongues must be pushed forward to bring the wide back end of the slot to a point where its width equals or exceeds the diameter of the stud, and then pushed away from the shield and pulled back. The parts of the appellants' and appellees' buckles are as follows:

APPELLANTS' BUCKLE.

- (1) Shield with back flanges (old).
- (2) Transverse bar or studs on flanges.
- (3) Tongue with longitudinal tapered slot.
- (4) Stud with kerfs on back of shield.

APPELLEES' BUCKLE.

- (1) Shield with back flanges.
- (2) Transverse bar on flanges at front end.
- (3) Spring tongue with transverse slot.
- (4) Stud on face of swinging tongue.
- (5) Transverse bar on flanges at back end.
- (6) Swinging tongue on bar at back end.
- (7) Hook on end of swinging tongue.

It will thus be seen that exhibits E and F and the Bliss buckle leave out three essential elements of the Spangler buckle as covered by his patent.

A swinging tongue mounted on the back of a shield and provided with a stud that enters a strap to hold it to the buckle was not the invention of Spangler. Such construction is shown in Graves' patent of 1896 [page 72, Record]. A swinging tongue having a stud thereon is shown in the Latta patent of 1878 [page 84]. In the Graves patent the shield is called the buckle frame, and it is sewed or otherwise fastened to one end of the belt, while the other end is secured by the swinging tongue. The means for preventing the swinging tongue from escaping from the strap is somewhat different, but it is a bar passed over the end of the tongue to keep it from turning. In Spangler a tongue is passed under a bar and engages the swinging tongue and the bar keeps the swinging tongue of Spangler from turning and escaping from the strap. In function Spangler's buckle is the same as Graves' buckle. In construction there is not as much difference between Spangler and Graves as there is between exhibits E and F and Spangler. An ornamented shield with interlocking

parts back thereof, one of which is connected to the shield and the other connected to an end of a belt whereby the belt is secured upon the wearer, is not Spangler's invention. Such construction is found in Busch's patent of 1872 [pp. 65-6], and in Mixer's patent of 1901 [p. 76], where the special objects of ornamentation of the shield and the position of the interlocking elements back of the shield is especially set forth. In the patents to Koopman, 1895 [p. 68], and Goldsmith, 1897 [p. 80], the interlocking elements are all back of the shield, and the shield is capable of ornamentation. *Now, in view of these patents, what did Spangler invent?* Spangler tells us: "The invention consists in the *novel provision, formation, combination and association of parts, members and features* ALL as *hereinafter described*, shown in the drawing and finally pointed out in the claim." [Folios 29-34, p. 61, Record.] The italics are ours. Of the elements described appellants only use the shield with its back flanges, which we have shown is old. The other parts are not of the same "formation" as Spangler's other parts. They are not "*combined*" in the same manner that Spangler combines his parts. They do not have the same "*features*" as Spangler's parts. Spangler's shield with a swinging tongue carrying a stud is old, as shown in Graves' patent of 1896 [p. 72, Record]. A part carrying a hook on one end of the belt attached to the back of the shield, and another part having a transverse slot therein attached to the other end of the belt, the hook being received in the slot in the tongue to effect the engagement of the ends of the belt, the interlocking parts being back of the shield, is old, as shown

in Koopman, 1896 [p. 68], Mixer, 1901 [p. 76], and Goldsmith, 1897 [p. 80]. If there is any novelty it resides in putting a hook on the end of the swinging tongue, using a *spring tongue* with a transverse slot, into which slot the hook of the swinging tongue is received, and a bar spaced from the back of the shield under which the spring tongue is passed to go into automatic engagement with the hook of the swinging tongue.

Appellants do not use this "*combination*" of parts, neither are their parts of the same "*formation*." They use a less number of parts, all of which except the shield, which is old, are different in "*formation*," different in "*combination*," different in "*construction*," and different in "*association*."

In *Union Match Co. v. Diamond Match Co.*, 162 Fed. Rep. 148, at page 155, the court (C. C. A. 8th Circuit), in speaking of anticipating patents, says:

"Without holding that the devices of any of the foregoing patents amount to anticipations of the claims in suit, as to which we express no opinion, it is sufficient for our present purpose to observe that they disclose that many inventors had been engaged in various ways and with varying degrees of success in the effort to accomplish the beneficial results achieved by them.

"Complainant's invention, therefore, cannot be classified as a primary one, or the inventors as pioneers in the art to which they devoted attention. On the contrary, we think it clearly appears that their claimed invention concerns improvements made in a well developed art and accomplished results which are not new,

but at best only better than had been accomplished before. In view of this conclusion, complainant is entitled, in determining the issue of infringement or non-infringement presently to be taken up, to a narrow range of equivalents only. The public should be protected against unwarranted monopoly as much as the inventor against piracy. To accomplish both these ends the patentee is entitled to monopolize the very device of his patent, together with all fair mechanical equivalents thereof. But in determining what are such equivalents the public has a right to demand a careful scrutiny, so that under the pretense of his patent the patentee shall not be allowed to improperly stifle competition and enjoy an unmerited monopoly. When the invention is a primary one, and the inventor is a pioneer in a given art, he is worthily entitled to a wide range of mechanical equivalents; but when the invention is along the lines of past efforts, which have met with more or less success, and the inventor has only an improvement in an art already well advanced, a proper regard to the welfare of the public and of other meritorious inventors requires that the range of equivalents should be reduced accordingly. *Miller v. Eagle Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 45 C. C. A. 544, 106 Fed. 693.

“Certain other well-settled principles may appropriately be adverted to before we take up the question of infringement. No device can be held to infringe a combination claim unless it employs all the elements of it;

in other words, the absence of a single essential element of a combination claim in an alleged infringing structure is fatal to the charge of infringement. *Cimioti Unhairing Co. v. Am. Fur. Ref. Co.*, 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Bramer Mfg. Co. v. Witte Hardware Co.* (C. C. A.), 159 Fed. 726; *Portland Gold Mining Co. v. Hermann* (C. C. A.), 160 Fed. 91. A patent for described means or mechanism to accomplish a desired end must be limited to the particular means described in the specifications or their clear mechanical equivalents, and does not embrace or cover any other mechanical structure which is substantially different in its construction or in its operation. *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547; *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; *Westinghouse v. Boyden B. B. Co.*, *supra*; *Bryce Brothers v. National Glass Co.*, 53 C. C. A. 611, 116 Fed. 186; *O. H. Jewell Filter Co. v. Jackson*, 72 C. C. A. 304, 140 Fed. 340.

“With these principles of law concerning mechanical equivalents, infringement of combination claims, and limitation of means for producing given results in view, we approach the decisive question in the case: Is the defendant an infringer? Presumably it is not. Its device is in substantial conformity to the machine of the Wyman patent, No. 736,668, which was issued to defendant August 18, 1903, after the patent in suit was issued to complainant. Both defendant’s patent and its alleged infringing device were intended to accomplish the results sought to be accomplished by the two groups of complainant’s patent under consideration. The grant of a patent to defendant to accomplish these results,

with complainant's patent presumably in view and under consideration, indicates that the Patent Office considered the means of the former to be different from the means of the latter, and raises a presumption that they are in fact substantially different (*Boyd v. Janesville Hay Tool Co. and Kokomo Fence Machine Co. v. Kitselman, supra*); and this presumption, we think, is re-enforced by the facts of the case. The defendant's structure is differentiated from complainant's, both in that it does not employ all the elements of complainant's combinations in the construction of its device, and in that the structure of the defendant does not employ the same means or operate in the same way as complainant's. It fails to disclose the requisite identity of means or of operation. *Cimiotti Unhairing Co. v. Am. Fur. Ref. Co., supra.*"

Binckley, complainant's expert witness, in comparing exhibits E and F with the Spangler buckle exhibit C, states: "There is, of course, a mechanical difference in the arrangements of these parts." [P. 42, Record.] On page 43 he says: "In conclusion I wish to state with respect to the functions and uses of the buckles constituting complainant's exhibits A and C and complainant's exhibits E and F, that there is no functional difference in any of the essential elements of the exhibits." The court below adopted this view and gave judgment for appellee, losing sight of the fact that *functions are not patentable*, and that Spangler was not an originator, but merely an improver.

While it is true that appellants' combination of parts effect the same result as the combination of parts of

Spangler, it is equally true that results are not patentable. The same results were accomplished by parts differently formed and combined differently years before Spangler entered the buckle field.

The Busch buckle of 1872 [p. 65] is perfectly covered by Spangler's claim up to the point where he commences his description of what his interlocking elements consist in [line 17, p. 63]. Taking the elements of Spangler's claim and comparing them with the Busch buckle, we have the following: A buckle comprising, 1 a shield or plate provided with a rearwardly disposed bar spaced therefrom, 2 holding means for connecting the shield or plate with a strap or other device, 3 interlocking elements (3a) one of said interlocking elements being connected with said shield or plate rearwardly thereof, and (3b) holding means for connecting the other of said interlocking elements with a strap or other device.

Busch has, 1, "a shield or plate (A) provided with a rearwardly disposed bar spaced therefrom (b), 2 holding means for connecting the shield or plate with a strap or other device (hooks a-a), 3 interlocking elements (3a), one of said interlocking elements being connected with said shield or plate rearwardly thereof (bar b), and (3b) holding means for connecting the other of said interlocking elements with a strap or shield (the other interlocking element of Busch is the hook held on the end of the strap by rivets).

The testimony of F. E. Monteverde, an expert witness for defendants, comparing the Spangler and Busch

patents and Spangler's patent with exhibits E and F, found on pages 47-51, Record, is as follows:

"Referring to the Spangler patent and the Busch patent, 'Defendants' Exhibit 1,' each buckle has a shield or plate provided with rearwardly disposed bars spaced therefrom. In the Spangler patent the shield is marked 6 and the bar 8. In the Busch patent the shield is marked A and the bar b. Big A and the bar small b. In the Spangler patent bar 8 is held by the side flanges turned up from the face of the shield, and in the Busch patent the bar b is held by lugs; also on the back of the shield. Both have holding means for connecting the shield with the strap shown in both drawings. In the Spangler patent the holding means is a stud marked 13. This stud is on the shank of the interlocking springing tongue 10. In the Busch patent the holding means are the retaining hooks shown as a, which are shown in the drawing. Both patents have interlocking elements, one of which is connected to the shield and the other to the end of the strap. In the Spangler patent the interlocking element which is connected to the shield is a spring tongue 10, this tongue having a hook 12 on the end thereof and a stud 13 thereon; and the other interlocking element is a spring tongue 15, which has a transverse elongated slot 19. This elongated slot occurs in the outer end, which allows the curved lip or hook 12 of the springing tongue to pass into engagement with the end of the springing tongue 15.

In the Busch patent the interlocking elements are the bar, marked b, already mentioned, and the hook d, which hook attaches over the bar b. I have examined

exhibits "E" and "F." With a slight modification in the construction they are both practically alike, substantially the same one with the other. Both of these exhibits have a shield, has the same construction practically as the Spangler and Busch patents. They also have a stud connected to the back of the shield at the front end of the shield by means of which the free end of the belt is detachably and adjustably connected to the shield. In this respect they are identical with the Busch patent except that Busch uses two curved studs or hooks, substituting them for the single stud in the other one. The elements in this construction I do not find in the Spangler patent. Another method of uniting the two ends of the belt, that is to say, these two exhibits, in their method of uniting the two ends of the belt, they differ from both Spangler and Busch. These exhibits both have a tongue which has a longitudinal slot broader at the end nearest the point where it is secured upon the end of the belt and narrowest toward the other end, and is attached upon the end of the belt. The manner of attachment to the end of the belt in this exhibit is shown by clamping over three triangular pieces that have been gouged from the plate proper and riveted over and clamped onto the end of the plate that holds it (witness points to complainant's exhibit "E"), and in the other exhibit the clamping is practically the same, except in one case it clamps longitudinally and in the other one transversely, but the method of clamping is identically the same in both. This tongue that I have described and shown in the exhibit is passed under lugs secured upon the side flanges of the shield, which lugs are secreted near the stud and then

are passed over the stud itself, with the slot surrounding the said stud, that is, after the free end of the belt is on the stud.

It is the same on both. I am answering in regard to exhibits "E" and "F," referring to complainant's exhibits "E" and "F." In this construction these exhibits "E" and "F" are different from both the Spangler and the Busch patents. In the Busch patent the hook d hooks over the bar b, thus holding the ends of the belt together. In the Spangler patent the stud 13, and the tongue 10, to lock the belt, this tongue 10 must be passed into the free end of the belt and the spring tongue 15 is then passed under bar 8, and the transverse slot 19 permits the end thereof to snap into engagement with the hook 12 on the end of tongue 10. Now, these kerfs on the studs of both the above-mentioned exhibits are for the purpose of allowing the stud to slide a little further in the slots, and to keep the tongue from longitudinal movement as to the axis of the stud when in contact with the sides of the stud when within the kerfs. They also serve as a safeguard to keep the tongue from slipping longitudinally on the stud. Were these kerfs omitted, the engagement and holding capacity would be just as great in one sense, but not in the other; that is to say, omitting the kerfs the tongue might be subject to longitudinal movement as to the axis of the stud, and therefore more likely to come off the stud accidentally. This would not occur by the use of the kerfs.

Referring to the engagement between the tongues in exhibits "E" and "F" with the studs in those exhibits

I would describe the interlocking device not as hooking the parts together or connecting them by hooking one upon the other, but more as a button and button-hole engagement, the stud representing the button in the case and the triangular shaped slot representing the button-hole.”

The testimony of F. Waterfield, an expert witness for defendant, comparing the Spangler and Busch patents and Spangler's patent with exhibits E and F, found on pages 53-56, Record, is as follows:

“The points of similarity and dissimilarity between the buckles described in the Spangler patent, the patent in suit, and the Busch patent are as follows: They both have a shield and a rearwardly disposed bar spaced therefrom. The bar on the Spangler patent is secured to the side members of the shield and the bar on the Busch patent is secured to lugs mounted on the back of the shield. Both have interlocking members, one of which is fastened to the shield and the other to the free end of the belt. In the Spangler patent the interlocking members consist of a spring interlocking hook 10, having a hook 12 on one end of it and a stud 13; and a spring tongue 15, having a transverse slot near the end of that fastened on to the free end of the belt. In the Busch patent the interlocking members consist of hooks fastened to the back of the shield and a hook that is fastened onto the free end of the belt, which hooks over the bar b, secured to the back of the shield. These buckles on exhibits “E” and “F” are substantially the same. There is a slight difference in construction, but for practical purposes they are the

same. Exhibit "E" compares with the Spangler patent; they both have a shield, side members interlocking elements; the retaining members of the Spangler patent consist of the swinging tongue 10 and the stud 13 as far as the shield is concerned, and on the exhibit "E" the retaining members consist of a stud that is secured at one end on the back of the shield. The interlocking elements consist in the Spangler patent of the swinging tongue 10, the stud 13 thereon and a hook that has a curved lip that curves rearwardly, and the spring tongue 15, that has got a transverse elongated slot near the end, and this spring tongue is passed under the bar 8, and then is adapted to spring over and have a hooking engagement with the hook 12. In exhibit "E" the interlocking means consist of a bar which is similar to bar 8 in the Spangler patent, and the stud which also retains the belt—or rather secures the belt to the shield, and a tongue having an elongated slot that runs longitudinally of the tongue, and the largest end at a point where the tongue joins the belt and narrows down toward the other end. In the Busch patent the interlocking means consist of the bar b, which is disposed rearwardly from the back of the shield, and a hook d, which is secured to the free end of the belt and which hooks over the bar b. The belt is secured to the shield in the Busch patent by means of curved studs or hooks a, which are secured to one end of the shield. The function of those kerfs in exhibits "E" and "F" is to allow the spring tongue to slide further on the stud, and when the edges of the slot are in contact with the sides of the kerfs it prevents longitudinal movement of the locking tongue on the stud; that is,

the longitudinal movement is as to the axis of the stud. The engagement and holding capacity of the stud in the tongue would be as great were these kerfs omitted as it is with the kerfs, but it would be more liable to slip off the stud longitudinally than if the kerfs were there; provided as a sort of safeguard against accidental disengagement. The engagement of the tongue with the stud in these kerfs is not a hooked engagement, because in a hooked engagement a hook is necessary in order to make the parts perform their function. Remove the hook and the engagement is gone. In the case of these exhibits, if you remove the kerfs, the engagement is still there."

The court can easily compare these patents, and it will find the testimony of Mr. Monteverde and Mr. Waterfield is correct. The complainant did not introduce any testimony to contradict it because the testimony is absolutely true. As the elements of the Busch buckle can be read upon the broad terms of the Spangler patent it would infringe the claim, and is therefore an anticipation, unless the broad elements of Spangler's claim are limited and modified by the specific limitations of the latter part of the claim, as follows [see p. 63, last column]: "One of said interlocking elements consisting of a spring tongue adapted to be passed between said shield and said bar, and being provided with an opening, and the other of said interlocking elements being formed for hook engagement with said spring tongue through said opening." As thus limited Spangler's invention, if he made any, resides in the specific "construction, formation, combination and association" of these parts. This specific "construction, formation,

combination and association of parts” is not found in appellants’ buckles, exhibits E and F, or in the buckle of the Bliss patent.

The broad combination of elements of the Spangler patent, with the single exception of the bar rearwardly of the shield, is found in the Koopman patent of 1895, found on page 68, Record, and in Mixer’s patent of 1901, found on page 76, Record, and in Goldsmith’s patent of 1897, found on page 80, Record.

Busch states that one of the objects of his invention is to provide a buckle “the face of which can be made of any desired shape and ornamented in any desirable manner, while its face covers up and conceals the fastening devices.” [See paragraph middle last column, p. 66, Record.] Mixer shows an ornamented shield. [P. 76.] On page 77, folio 16, he says: “I employ two members which are adapted to interlock at their meeting ends, one of said members being formed with an outer portion or plate which is adapted to cover and conceal, the interlocking body portions of both members. The outer plate is thus adapted for the reception of filagree or for any other ornamentation.” The other patents referred to show a shield that can be ornamented. Again, we ask, of what does Spangler’s invention consist, if not of the specific “construction, formation, combination and association” of the parts back of his shield? An ornamented shield with interlocking parts to secure the ends of the belt together on the wearer, which interlocking parts are concealed by the shield and are on the back thereof, was first disclosed by Busch in 1872. Mixer in 1901 specifies the same thing as one of the objects of his invention.

Koopman, 1895, and Goldsmith, 1897, both show buckles having shields capable of ornamentation which conceal the interlocking parts. There was, therefore, nothing left for Spangler to invent in the buckle field but the specific "construction, formation, combination and association of parts, members and features" as described in his specifications and shown in his drawings, which is what he says is his invention. We say that in view of the prior art, there was no invention in making the changes in form of the interlocking elements back of the shield made by Spangler. Such changes are merely the work of the skilled mechanic. But if we concede that the making of such changes did involve invention, the invention resides in the specific changes of interlocking elements with their peculiar form and arrangement. Neither the buckle of the Bliss patent nor the buckles exhibits E and F have Spangler's specific arrangement of parts nor are the interlocking parts of the same form. Therefore, if Spangler's patent is valid for this specific formation and arrangement and combination of parts, nevertheless the defendants did not infringe by making buckles whose parts were more different in form and combination from the Spangler construction than his construction was different from the buckles of the prior patents.

In patents for a combination it is well settled that if any essential element of a combination is omitted from an alleged infringing device without substituting there-

for its clear mechanical equivalent, the charge of infringement is not sustained.

Fay v. Cordesman, 109 U. S. 408, Sup. Ct. 236, 27 L. Ed. 979;

Boyd v. Janesville Tool Co., 185 U. S. 260-267, 15 Sup. Ct. 837, 39 L. Ed. 973;

Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100;

Eames v. Godfrey, 1 Wall. 78, 79, 80, 17 L. Ed. 547;

Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906;

Union Match Co. v. Diamond Match Co., 162 Fed. 148-155, 156, 89 C. C. A. 172.

In Fay v. Cordesman above it is said, beginning at page 420 of 109 U. S., at page 244 of 3 Sup. Ct. (27 L. Ed. 979):

“The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality.”

In *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547, in speaking of a patent for a combination, it is said:

“The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts.”

In *McCormick v. Talcott*, 20 How. 405, the Supreme Court said:

“If the patentee be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions, by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original and patentable as such. But if the invention claimed be itself but an improvement on a known machine by mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first.

“And see *Kokomo Fence Co. v. Kitselman*, 189 U. S. 8, 47 L. Ed. 689, 23 Sup. Ct. Rep. 521, in which case

it was held that where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained. * * *

In the light of the facts presented in this case and the law applicable thereto, the appellants respectfully submit that the decree of the lower court should be reversed with instructions to that court to dismiss the bill of complaint, first, because there was no joint infringement; second, because there is no invention in complainant's patent; and third, because the appellants do not infringe.

Respectfully submitted,

G. E. HARPHAM,
Solicitor for Appellants.

No. 2370.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Walter B. Bliss and Fresno Mono-
gram Adjustable Buckle Com-
pany, a corporation,

Appellants,

vs.

George P. Spangler,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This cause comes before this court on an appeal from an interlocutory decree entered against the Appellants-Defendants Walter B. Bliss and Fresno Monogram Adjustable Buckle Company, which interlocutory decree held that the Spangler patent No. 972,937 sued on was valid and jointly infringed by all the three Defendants, being those named and Modern Sales Agency of America, Limited, a corporation, against which latter the Bill was taken *pro confesso*; the Bill alleging that all three Defendants have jointly infringed upon the rights secured to Appellee-Complainant, by the acts of

the three Defendants “as *parties participating in the manufacture, use and sale of clasps or buckles*” embodying, containing and embracing the invention described, claimed and patented in and by said Letters Patent No. 972,937. The Defendant Bliss by his answer to the Bill interposed no defenses other than want of knowledge or belief or denial of the allegations of the Complainant. The Defendant Fresno Monogram Adjustable Buckle Company, in addition to such denials, interposed as its sole defenses certain prior Letters Patent of the United States. The interlocutory decree held that the Appellee is the owner of said Letters Patent No. 972,937, hereinafter referred to as the Spangler patent, that the Appellee-Complainant had properly marked devices made by him containing the patented invention of the Spangler patent, thereby duly notifying each of the Defendants of said Spangler Letters Patent; and that demand was made upon each of said Defendants to cease such infringement. The decree provided for the usual accounting and injunction, the latter directed against each of said Defendants, and ordered the usual taxation of costs against each of the Defendants. Further, the decree held that the three Defendants intend and threaten to continue such infringement.

The Defendants Bliss and the Buckle Co. assigned the following errors upon taking their appeal [pages 93 and 94 of the Transcript]:

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that there was a joint infringement by Walter B. Bliss, Fresno Monogram Adjustable Buckle Company and Modern Sales Agency

of America, Limited, of the Letters Patent sued on in this action.

2. The Court erred in entering a decree in favor of Complainant.

3. The Court erred in finding and decreeing that the Letters Patent sued on are good and valid in law.

4. The Court erred in finding and decreeing that the buckles Exhibits "E" and "F" were an infringement of the Letters Patent sued on herein.

5. The Court erred in holding and finding that the anticipating patents did not constitute an anticipation of the claim of the patent sued on herein.

6. The Court erred in holding that the anticipating patents did not limit Complainant's patent to the exact construction set forth therein and in the claim thereof and as so limited that the buckles Exhibits "E" and "F" infringed said Letters Patent and the claim thereof.

For purposes of convenience and directness and completeness of reply to Appellant's brief the order in which Appellant presents his points and authorities will generally be followed.

I.

JOINT INFRINGEMENT SUFFICIENTLY SHOWN.

Although the main issue in this case pertains, of course, to the validity of the Spangler patent and the interpretation thereof, and the infringement thereof by the structures of the Appellant, the question of joint infringement is best disposed of initially. As the Bill was taken *pro confesso* against the Defendant Modern Sales Agency of America, Limited, and as this De-

fendant is not before this tribunal on this appeal, there is, of course, nothing but the transcript to stand upon as to the acts of this Defendant complained of. The testimony of Spangler [page 25, Transcript], and Complainant's Exhibit B, however, show that this Defendant was specifically notified of the patent before the suit thereon. The transcript shows that the decree was entered against this Defendant jointly with the other Defendants, and as the decree was entered *pro confesso* against it it is only to be assumed that the Bill was correct, although no testimony was taken on either side of this question. But joint infringement still attached to the acts of the Defendants-Appellants, as is clearly established by the stipulation of facts entered into between the Appellants-Defendants and the Appellee-Complainant, dated April 15, 1913, as found on pages 90 and 91 of the transcript. This stipulation was entered into after the Defendant the Buckle Company had offered in evidence a copy of United States patent to one Walter B. Bliss, appearing on pages 86 to 89 of the Transcript, without any identification thereof or the connecting thereof with the Appellant of that name; and it was in order that the court might fully be informed of the circumstances involving both this Bliss patentee and the Appellant of that name, and that the relations of Bliss and the Buckle Company might be of record, that this stipulation was invited by Appellee. No testimony of Bliss was taken. It so developed that Appellant Bliss was such patentee, and that at the time the Buckle Company were manufacturing and selling the buckles complained of such company owned said patent; that said Bliss had himself infringed the patent, if our

charge be sustained; and that since the issuance of the Spangler patent Bliss had joined with the Buckle Company or been associated with the Buckle Company in connection with the making and selling of such infringing buckles. That joint infringement existed as between Bliss and the Buckle Company this stipulation permits of no doubt. Joint infringement is thus established, and as to the Appellants it is immaterial as to whether there was found joint infringement, in any or in all acts, of such Appellants with the Defendant Modern Sales Agency of America, Limited.

See

Toppan *et al.* v. Tiffany Refrigerator Car Co.,
39 Fed. 420;

Featherstone v. Ormonde Cycle Co., 53 Fed. 110.

Although the infringing buckles bear close relation to the disclosure of the Bliss patent, as we shall show, the record shows no comparison of the same with such patent, and even if they were made in accordance with such disclosure there is no controlling presumption that infringement did not thereby arise. While the granting of a patent is *prima facie* evidence of a *difference* between its subject and that of a prior patent, nevertheless the granting of a patent conveys no right to the patentee to make, use and sell, but only the right to *exclude others* from such manufacture, use and sale.

Hermann v. Youngstown Car Mfg. Co., 191 Fed.
579 (pages 584 and 585).

Bliss defended the action, and there was no showing that he had discontinued his relation with the Buckle

Company. The stipulation speaks for itself; but its fair import is an admission that Blass was “related with” the Buckle Company, during the times concerned in the proofs, in connection with making and selling the infringing buckles, and that is sufficient to establish the joint infringement side of the case. Only Bliss and the Buckle Company are appealing.

It is for the Master, on accounting, to find how far the several Defendants *participated* in the infringing acts. The injunction operates against *all* infringing acts.

See

Toppan *et al.* v. Tiffany Refrigerator Car Co.,
and Featherstone v. Ormonde Cycle Co., *supra*.

II.

THE SPANGLER INVENTION.

As will develop in connection with the discussion of the prior art, the Spangler patent introduced into the art a radically novel departure. It was not new to provide an ornamental shield or plate to be exposed forwardly or outwardly upon the belt; nor fastening means for holding the ends of the belt together behind such shield or plate. The problem in the art had been how to form, arrange and interrelate such fastening means so that simple and convenient relative adjustment of the ends of the belt might be effected, to lengthen or shorten the operative portion of the belt encircling the body of the wearer; and further how to provide for easy and convenient attachment and detachment of the belt and buckle, in application to and removal from the

person. A further problem was to accomplish all these results and at the same time provide means and devices thereunto which would lie substantially flat between the ornamental plate or shield and the wearer so as not to impinge uncomfortably upon the wearer and tend to tear the clothing. The final factors desired were compactness, neatness and attractiveness of appearance of the whole, and an approximately complete masking of the entire adjusting, fastening and holding organization, so that the buckle or clasp might be self-contained as to all its features and have the appearance merely of an ornamental device or attachment rather than that of mechanical adjuster, fastener or means of attachment. Spangler conceived the idea of providing a *single or unitary* means to hold one end of the belt, which we will call the butt end, in position flat against the back of the shield, and also to inter-engage with means upon the other end, which we will call the free end of the belt, so that both ends of the belt would be held together when on the wearer, and also held to the shield in close assemblage. This he accomplished. In the one form disclosed in the Spangler patent the shield 6 has pivoted behind it, between side flanges 7, upon a bar 9, a tongue or plate 10 carrying a rigid stud or pin 13 which is entered in the proper hole 14 in the butt end of the belt, in accordance with the adjustment of the butt end with respect to the shield; such stud in operative position passing clear through the hole and engaging with the back face of the shield. The outer or free end of the plate 10 has an angular lip or hook 12 formed to be engaged with a tongue 15 suitably attached to the free end of the belt, such

tongue 15 having a slot 19 which receives the curved lip 12. When the stud 13 is in the belt hole and the lip is hooked into the slot 19, the butt end of the belt is held flat against the back of the shield between the tongue 15 and plate 10 and the shield. A cross bar 8 spaced rearwardly from the shield extends between the side flanges 7, and the tongue 15 is passed between the butt end of the belt and this cross bar when it is to be engaged with the lip 12. This cross bar likewise serves to hold the tongue 15 down against the butt end of the belt, likewise holding down the plate 10 and holding the stud 13 against the back of the shield, through the hole in the butt end of the belt. When the belt is to be detached from the wearer, the tongue 15 is simply moved slightly to disengage the lip 12 from the slot 19, whereupon the tongue 15 may be slipped free of the lip 12, at the slot 19. The tongue 15 is preferably metallic and necessarily has an inherent spring quality which assists in engagement with the lip 12, and also in holding the butt end of the belt down against the back of the shield. It will be noticed that the side flanges 7 enclose approximately all of the adjusting and fastening parts, forming with the shield a box open at the ends and back and which, with the belt ends, masks all of the working parts of the device from view when the belt and buckle are in place on the wearer. This latter feature, while not specifically recited in the claim, is a part of the general disclosure of the patent, and is not found in the prior art cited, but is nevertheless industriously appropriated by the Appellants, being a striking feature of the imitation which will hereinafter in detail be pointed out.

The pivoted plate 10, carried by the shield through the side flanges, constitutes the unitary means for holding the butt end of the belt in position flat against the back of the shield, through the agency of the stud 13 fixed to said plate 10, and for holding both ends of the belt together and to the shield, through the agency of the lip 12 upon said plate 10 and which is inter-engaged with the tongue 15 attached to the free end of the belt and which likewise bears against such portion of the butt end of the belt as may lie rearwardly of the shield in that zone of the buckle. In combination with this broad subject matter, Spangler further provided the cross bar 8 serving to guide the tongue 15 when advanced for engagement with the plate 10, and likewise serving to hold the tongue 15 down against the butt end of the belt and hold the latter against the back of the shield. The compactness of this structure and further advantages are pointed out in the Spangler patent [lines 100 to 117, page 2, page 62, Transcript.] Spangler states clearly the object of his invention, as witnessed by lines 9 to 28, page 1 of the patent specification, page 61 of the Transcript, namely:

“This invention relates to clasps or buckles, or similar adjustable connection and attachment devices; and it has for its object to provide improvements with relation thereto which will be superior in point of positiveness in operation, convenience in use and manipulation, facility in installation or connection, and disconnection, with respect to working position, relative simplicity and inexpensiveness in construction and general efficiency.

“The invention has for its particular object the provision of an improved clasp or buckle which will be

more slightly in appearance and more conveniently manipulated, in service, than are devices of the same character now customarily employed; and the use of which is attended by less injury to the belt or other device or object in connection with which it is employed."

In this statement as to the last feature, a clear distinction is drawn as between the toothed swinging clamps such as shown in the prior art cited and which constitute the familiar suspender fastener of the prior art, as witness the Mixer patent [pages 75 to 78, Transcript].

Spangler then states, lines 29 to 34 of page 1 of the Spangler patent:

"The invention consists in the novel *provision*, construction, formation, combination and association of parts, members and *features*, all as hereinafter described, shown in the drawing, and finally pointed out in claim."

SPANGLER PATENT AND CLAIM THEREOF BROAD IN PROPER INTERPRETATION.

It is to be noted that broadly the object is that of novel *provision*—not only of parts and members, but of *features*, together with the construction, formation, combination and association of such features and the parts and members exemplifying or embodying such features. What broader and more comprehensive statement can be made of the nature of any mechanical invention? The Spangler claim will not be found limited in its specific terminology to any of the particular features of the disclosure of the specification and draw-

ing of the Spangler patent. It calls for, first, a shield or plate (6); second, a rearwardly disposed bar spaced therefrom (8); third, holding means for connecting the shield or plate with a strap or other device (specifically the stud 13 upon the plate 10); fourth, interlocking elements, or rather one of said interlocking elements, the same being connected with said shield or plate rearwardly thereof (specifically the lip 12 upon the plate 10); fifth, holding means for connecting the other of said interlocking elements with a strap or other device (specifically the pin 18 entering holes or openings 17 in the ears 16 projecting from the tongue 15 which is connected with the free end of the belt, or the teeth 21, if preferred); and, sixth, the other of said interlocking elements being the tongue 15, having inherent spring quality, and which has the slot 19 which receives the lip 12.

This spring tongue, the claim recites, is adapted to be passed between said shield (6) and said bar (8); and that the first interlocking element, lip (12) is formed for hook engagement with said spring tongue through the slot (19) in it.

The third and fourth of these main elements constitute the unitary means above referred to for holding the two ends of the belt together and both to the shield and holding the butt end flat to the shield. The claim is to be read as a whole, taken in connection with the specification and drawing, and is a fair embodiment of the broad subject of the invention which has been delineated.

Against this broad and important, if not pioneer, invention the Appellants raise a prior art, in one example

of which is found an approximation of one element of the Spangler invention, or one of the specific parts disclosed as the embodiment thereof shown in the patent, and in another example of which prior art they find another such feature; but not in a single instance in the prior art can they find any suggestion or hint of the broad invention stated above, with the *unitary* means acting to hold the butt end of the belt flat to the shield at the back thereof, and to engage with means on the other end of the belt to hold both ends of the belt together and to the shield, providing a compact, adjustable and readily manipulated device, of neat and unobtrusive appearance.

PRIOR ART FRAGMENTARY AND NOT ANTICIPATORY.

Let us survey this prior art hand in hand with Appellants, as on page 10 of their brief. Patent to Busch [pages 64 to 66, Transcript] does indeed disclose a shield with a rearwardly disposed bar *b* spaced therefrom. On the other hand, it shows separate means (not unitary), namely, the hooks *a* and the transverse bar *b* for engagement with the opposite ends of the belt. Nor does the transvers bar *b* pass over the free end of the belt;—it is simply an anchorage for the hook *d* on the free end of the belt. There is no cross bar extending over the free end of the belt to hold it in place, and there is no tongue with a slot in it. The hooks *a* are presented next to the clothing of the wearer, where they may readily engage and tear the same. Busch, Koopman, Mixer and Goldsmith do show means for connecting the buckle with the belt; Mixer and Goldsmith also having shields. Not one of these prior patents shows

the unitary means of Spangler, nor does any one of them show the cross bar of Spangler, nor the tongue of Spangler passing beneath the cross bar, and consequently no such tongue holding the butt end of the belt down. These patents all show distinct and separate parts for holding the separate ends of the belt together, and through various connections, to the shield. Nor do any of these patents show interlocking elements, one being connected with the shield or plate rearwardly thereof and the other consisting of a tongue adapted to be passed between said shield and said cross bar and having hook engagement with the other of said interlocking elements. In fact, not one of said prior patents shows anything suggestive of the stud 13 of Spangler, being specifically the holding means for connecting the shield or plate with the belt, and an integral or rigid part of the lip 12 which has hook engagement with the tongue. This stud, holding the butt end of the belt, and being integral or in rigid connection with the part that interlocks with the tongue, will be found to have been embodied essentially in the infringing structures. As far as these patents go, in similarity, is to show among them a shield, and inter-hooking parts connecting the ends of the belt, through various agencies, with the shield. The part which holds the butt end of the belt to the shield in not one single instance permits the adjustment of the butt end of the belt and holds it in place back of the shield, and at the same time interlocks with the free end of the belt. In other words, not one of these patents answers the requirements of the broad statement of the invention which contemplates the so-called *unitary means* of the Spangler patent. No

cross bar operating the same as Spangler's cross bar 8 is found in any of them, and, as stated, no integral or rigidly connected or one-piece stud and interlocking element. Nor is the pierced tongue on the free end of the belt and having interlocking engagement with the unitary device upon the shield found in a single one of these prior patents. Nor does a single one of these prior patents show the box-like structural housing and concealing all the working parts. An edge view of the Spangler device, such as obtained in looking down upon the buckle when in place upon the wearer, discloses none of the working parts. In these prior patents the working parts are visible, and the cumbersome mechanical nature of each device is at once manifest. The cleverness manifested by Spangler in providing this box-like enclosure was recognized by Appellants, and they immediately imitated the latter and have always used it. As above stated, this box-like structure is not specifically claimed, but its appropriation by Appellants is the best kind of evidence of piracy, of imitation, and of following the teaching of the Spangler patent rather than that of the prior art. *All of the above leading features of the Spangler patent* which have been pointed out in differentiation from these prior patents are incorporated in the infringing structures, element for element, function for function. And yet Appellants bow in adoration to the prior art and turn the cold shoulder of denial upon the Spangler patent, which has been the reference work of their shop and salesmen.

SPANGLER TOOK FINAL STEP IN THE ART.

It certainly showed great inventive ability in Spangler to enter an art replete with patented attempts and produce the buckle which has taken the field. The Spangler patent, which is found to materially differ from each one of these prior patents, and from all of the same taken together, is so closely and painstakingly followed in the infringing structures, by Appellants, in a record in which there is not a word to support the assumption that a single one of these prior patented devices ever was made or sold, that the loud tones of Appellants in denial of infringement dwindle to unintelligible whispers when ear is given to the voice of the record. This voice cannot be mistaken, and it says: *"Spangler took the final step in the art, and this taught Appellants how to walk."* This is paraphrasing Mr. Justin Brown in "The Barbed Wire Patent," 143 U. S., when he said:

"In the law of patents it is the last step that wins."

Of the other prior patents relied upon by Appellants, Latta, for a trace-buckle, shows no shield adapted for ornamentation, no single part holding the two ends of the belt (for there is no belt) together, and of course not to a shield, no interlocking parts such as Spangler, and no slotted tongue and no transvers bar over the same, nor any box-like enclosing structure.

Graves shows what happens to be one specific feature of the Spangler buckle, namely, a swinging plate, 7, with a stud 11, but this plate has no hook or lip, such as in the Spangler patent, at its outer end, for interlocking with a tongue, no such tongue or the like, and

Graves has no ornamental shield or plate, nor box-like frame. One end of the strap is riveted fixedly to the buckle frame, which is the antithesis of anything disclosed by Spangler. The only resemblance is means for adjustably connecting one end of the strap with the buckle frame through the stud 11. There is no interlocking engagement and no mode of operation which suggests that of Spangler. It will be seen that these further patents in the prior art are all as radically differentiated from the Spangler patent and any essential features thereof above pointed out, and even more so, than the Goldsmith, Mixer, Koopman and Busch patents above discussed; and no one or all of the same taken together can anticipate *the provision of parts and features*, and the combination and inter-relation of the same, constituting any embodiment at all of the Spangler invention.

The expert witnesses of Defendant do not discuss any of the prior patents other than the Busch patent above referred to, and the Busch patent has been disposed of above by clearly distinguishing the same from the Spangler patent. The testimony of Defendants' expert witnesses taken together corroborates these differentiations. [See testimony witness Waterfield, page 57, Transcript, and of witness Monteverde, page 52, Transcript.]

LAW IN THIS CIRCUIT AS TO ANTICIPATION.

This court is squarely on record, in a recent decision, against attempted anticipation by any such fragmentary unrelated features as may be picked out here and there in the prior patent art. It was said in *Stebler v. River-*

side Heights Orange Growers' Ass'n. *et al.*, 205 Fed. Rep. 735, at page 738, quoting from the decision in Los Alamitos Sugar Co. v. Carroll, 173 F. R. 280, 97 C. C. A. 446, also decided by this court:

"It is not sufficient to constitute an anticipation, that the device relied upon might, by process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent."

Citing:

Western Elec. Co. v. Home Tel. Co. (C. C.),
85 Fed. 649;

Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct.
825, 36 L. Ed. 658;

Parker v. Stebler, 177 Fed. 210 (a decision of
this court);

Gunn v. Bridgeport Brass Co. (C. C.), 148 Fed.
239;

Ryan v. Newark Co. (C. C.), 96 Fed. 100;

Simonds R. M. Co. v. Hathorn Mfg. Co. (C. C.),
90 Fed. 201-208;

Gormully & J. Co. v. Stanley Cycle Co. (C. C.),
90 Fed. 279;

Merrow v. Shoemaker (C. C.), 59 Fed. 120.

SPANGLER TOOK LONG STRIDE IN THE ART.

There is evidence in the record that Spangler was practically a pioneer as far as anything more than a paper art is concerned. Spangler says [page 29, Transcript]:

"Prior to the time I placed my buckle or buckles like 'Complainant's Exhibit 'C'' on the market I had never

seen a buckle having a plate or shield outwardly exposed or presented with the two ends of the strap or belt engaged together behind the plate or shield by means of a member on one end of the belt engaging with a member adjustable connected with the other end of the belt, such engagement being between a slotted tongue on one belt-end and means connected with the plate and permitting adjustment between the plate and the other end of the belt."

Ross, who testified [page 35, Transcript] that he is a merchant in the trunk, baggage and suit-case line, and employs Spangler, and that he had been handling carved leather belts from 1892 to about 1905, when he then went into the business stated, and that he has been selling the Appellee's buckles and belts, said that prior to handling these Spangler buckles he had "seen buckles with a plate that is snapped over but nothing that is slid underneath that and fastened in the way that Exhibit "C" is fastened, that is slid behind the plate." He also testifies that the business of selling the Spangler buckles fell off a little about a year ago last spring. This falling off is likewise referred to by Spangler [page 30, Transcript], and shows the effect of the vigorous invasion of the market by the infringing buckles. Spangler further testifies [page 25 of the Transcript], that he is by occupation a belt manufacturer and has been engaged in that line twenty-five years. This testimony of men skilled and advised in this art practically establishes the Spangler invention as pioneer in the buckle art. Not a word of testimony was taken to show the contrary. There is but one assumption; namely, that the prior patented devices

never went extensively onto the market. The Spangler invention took and held the field. Spangler, in his small way, largely in the store of the witness Ross, had sold some seven hundred of the Spangler buckles from June, 1910, until the spring of 1913 [pages 28 and 30, Transcript]. Spangler testifies that he is employed by Ross, and that he has no considerable capital to employ in the manufacture of these buckles [page 31, Transcript]. His limited ability to exploit his invention made it easy for the corporate Defendant to play the pirate and reap the benefits which he should have received.

PRIOR UNSUCCESSFUL ART TO BE JUDGED ACCORDINGLY.

As against any such attempted anticipations, the rule is well established, as set forth in the opinion rendered in the *Western Elec. Co. v. Home Tel. Co.*, 85 Fed. 649:

“The force of this ruling is made manifest, in its practical applications to the rights of parties, by the reflection that all earlier patents set up in defense against a later patent sued upon are but the record evidence of the status the art has reached. The rights under such later patent are subject to what this record evidence *actually shows*. To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in principle, as to change, by interpolation or modification, any other evidence between the parties.”

Further see

Tannage Patent Co. v. Zahn, 70 Fed. 1003.

As said in *Wales v. Waterbury Mfg. Co.*, 59 Fed. 285 (a buckle case), one who takes old devices with material defects, and retains the desirable features with a definite idea of remedying the same, and adapts them by novel modifications to new and varying conditions, so as to produce an article confessedly superior to all others, is not anticipated by such prior devices.

The Circuit Court of Appeals of the First Circuit, in *Forsyth v. Garlock*, 142 Fed. 461-463, said:

“Our general observation as to these is that the citation of so many patents by a respondent in an infringement suit sometimes tends, as we have several times said, not so much to weaken the complainant’s position as to strengthen it, by showing that the trade had long and persistently been seeking in vain for what the complainant finally accomplished.”

SPANGLER PATENT CLAIM ENTITLED TO BROAD CONSTRUCTION.

While the claim of the Spangler patent is for a number of features, it is not strictly a combination claim. The word “combination” does not appear therein, and it is not a combination claim in the same sense as a claim for a group of inter-operating features, such as driving gears of a machine, is a combination claim. We shall be able, however, to show that every essential element of the Spangler claim, *as well as every essential feature of the Spangler invention*, is present in the infringing structures. On this head, as said in *Stebler v. Riverside Heights Orange Growers Ass’n., et al.*, *supra*, 740:

“True, the plaintiff’s rights do not extend beyond the claims in suit, and are subject to the limitations thereof; but the language of these claims is not, as argued by the defendants, to receive a narrow, literal construction. While the invention is not basic or primary, it is substantial and important, and is therefore entitled to a fair range of equivalents.” (Citing *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1112.)

We are now prepared to more specifically discuss the question as to whether this manifestly valid and unanticipated Spangler patent, as against which the only defense was alleged anticipation by the above carefully differentiated prior patent art, is infringed by the structures made and sold by the Appellants, and on that head we must bear in mind the importance of the invention and the long stride which the patentee took over the prior art cited.

III.

THE INFRINGING STRUCTURES.

What are the infringing structures? For a reasonably fair answer reference may be made to the Bliss patent (pages 86 to 89, Transcript], and more particularly to Figures 1, 2, 3 and 6 thereof, assuming the modification specifically shown in Figures 2 and 3 enters also into the construction shown in section in Figure 6, and which view is particularly referred to because it so closely follows the showing in Figure 3 of the Spangler patent. Figures 4, 5 and 6 show the stud 7 with an enlarged head, whereas Figures 2 and 3 show the stud with kerfs (saw cuts) or recesses 14

in the sides of the stud adjacent to the outer end; said stud being fixed rigidly to the shield 1. Otherwise the showing agrees substantially throughout all the Figures shown in the drawing of the Bliss patent. Complainant's Exhibit "E" shows substantially the showing of the Bliss patent and particularly of Figures 2 and 3 thereof. Complainant's Exhibit "F" merely provides an interrupted cross bar (or lugs) in substitution for the continuous cross bar 5 of the Bliss patent. It is to be noted that the Bliss patent specification says, in lines 34 to 36, page 1 of the specification [page 88, Transcript], that the rear edges of the flanges 4 are connected by transverse bars or keepers 5 and 6; and they perform identically the same functions as the Spangler transverse cross bar 8 and the bar 9 upon which swings the plate 10. As to the interrupted cross bar of Complainant's Exhibit "F," this is purely a mechanical equivalent of the Spangler patent's continuous cross bar 8 or of the Bliss patent cross bar 5. Expert Binckley so testifies [page 42, Transcript] as follows:

"The function of the lugs in Complainant's Exhibit 'D' is the same as the function of the corresponding lugs in Exhibit 'F' and of the bar in the corresponding position on Exhibit 'E.' "

The other transverse bar or its equivalent of the Bliss patent and of Exhibits "E" and "F" assists to hold the butt end of the belt in the box-like shield structure in the same manner as the bar 9 of the Spangler patent does. Binckley so testifies with respect to Exhibit "E" and the Spangler patented buckle as follows:

“The bar ‘9,’ carrying the hook ‘C’ (should be c) in Exhibit ‘A’ (Spangler patent) performs the double function providing support for this swinging hook (c) and retaining the belt in its proper relation behind the shield or plate. In Exhibit ‘E’ the transverse bar performs the same function of retaining the belt in its position. The function of the other transverse bar shown in Complainant’s Exhibit ‘E’ is to retain the spring tongue in position behind the belt when engaged with the stud.” [Page 42, Transcript.]

BOTH SPANGLER PATENT AND INFRINGING STRUCTURE
HAVE ESSENTIAL COMMON FEATURES.

Now this stud of Exhibits “E” and “F,” and of the Bliss patent, namely, of the infringing structures, serves to hold the butt end of the belt adjustably in position against the rear of the shield (the stud is entered in the proper belt hole), and also serves to interlock with the spring tongue 9 secured to the free end of the belt by the rivets 11. Thus the stud 7 constitutes unitary means for holding the butt end of the belt to and rearwardly of the shield, *and flat against it*, and for holding both ends of the belt together and to the shield. Binckley testifies [page 41, Transcript]: “In the use of Complainant’s Exhibit ‘E’ this stud performs the double function of retaining the end of the belt in the proper relation with the plate or shield and engaging with the spring tongue attached to the other end of the belt.” The spring tongue 9 of the Bliss patent and of Exhibits “E” and “F” (and these are spring tongues), has a slot in it through which the stud is passed; the walls of the slot, in a diminished portion,

being engaged with the stud 7 in the kerfs thereof in *hook engagement*. These spring tongues have a spring quality, as the witness Binckley testifies:

“The function of the spring tongue is the same in each case as far as I can see.” [Page 42, Transcript.]

“All have certain inherent spring quality, but this spring quality is not the same in exhibits ‘E’ and ‘F.’ There is more in ‘E’ than there is in ‘F.’ It appears to be the difference in the metal employed and the shape of the metal as formed.” [Pages 44 and 45, Transcript.]

When the spring tongues are to be engaged with the studs, in the several exhibits, they are passed under the cross bar or equivalent lugs. The modes of attaching and detaching the spring tongue on the free end of the belt and the stud are substantially the same as obtained with respect to the manipulation of the spring tongue and lip or hook 12 of the Spangler patent. The spring tongue of Exhibits “E” and “F” and of the Bliss patent is passed in under the cross bar or equivalent lugs, causing the flexion of the spring tongue which yields as the slot in the tongue comes over the stud. The witness Binckley testified to this as follows:

“Now, if each of the tongues of Complainant’s Exhibits ‘E’ and ‘F’ is placed at its outer end upon the outer end of the stud so that the tongue is flexed slightly and the tongue is moved along the stud until the stud passes through the opening this flexion will be relieved if the opening in the tongue approaches and engages the stud. In connecting the tongue with the stud in bringing the ends of the belt together the

tongue will probably be slid along the stud in engagement therewith." [Page 45, Transcript.]

So we have in the infringing structures and the Bliss patent, in common with the Spangler patent, a box-like shield body, *unitary means* for adjustably holding the butt end of the strap in the box-like shield body *flat* against the rear of the shield and for interlocking with another element, the latter being a spring tongue, connected with the free end of the belt, to hold both ends of the belt together and to the shield. And we further have in the infringing structures as in the Spangler patent, a transverse bar beneath which the spring tongue is passed in inter-engaging the spring tongue with the unitary means, and another transverse bar assisting the unitary means in holding the butt end of the belt flat against the rear of the shield. In the infringing structures as in the Spangler patent the spring tongue assists further in holding the butt end of the belt in position, as does the spring tongue in the Spangler patent, being held down by the transverse bar. As a matter of fact the shoulders formed by producing the kerfs or recesses in the sides of the studs in the infringing structures serve not only an interlocking function, by hook engagement with the spring tongue, but serve also as another short cross bar acting to hold the spring tongue down, such cross bar being connected to the shield through the remaining part of the stud. So if the cross bar be eliminated, the invention still remains embodied, the kerfs also assisting in guiding the tongue to final interlocked position.

The Exhibits "E" and "F" are conceded to be specimens of buckles manufactured and sold by the De-

fendant corporation within the jurisdiction since the date of issuance of the Spangler patent and prior to the filing of this suit. The assumption is that they were continuing to be sold prior to the inhibition of the injunction, as there is no denial of such continued sale, and the Defendant corporation defended the suit. Bliss is conceded to have similarly infringed and defended the suit. [See page 45, Transcript.] They threaten to continue to sell if permitted. And even if they did not, they must be held.

See

Winchester Repeating Arms Co. v. American Buckle Co., 54 Fed., page 711, end of next to last paragraph.

EXPERTS FIND CLOSE IDENTITY.

Now let us see what the several expert witnesses have to say with respect to the similarity or identity of structure and function of the Spangler patented buckle and the infringing structures. As to the cross bars and the equivalent lugs or interrupted cross bars and the spring tongues of the structures we have referred to the testimony of Binckley. The actions of these parts speak for themselves and there must be a spring quality in the tongues. Defendant's expert witness Waterfield refers to the tongues as spring tongues as follows [page 57, Transcript]:

"In both the Spangler patent device and the Complainant's Exhibits 'E' and 'F' there are means projecting inwardly of the flanges and over or behind the *spring tongues* when the parts of the buckle are inter-

locked, and the *spring tongues* and one end of the belts in each instance lie between these bars or ears and the plate or body of the buckle.”

Now as to the hook engagement between the spring tongues of the infringing structures and the recessed studs thereof, referring to pages 41 to 43, Transcript, Binckley testifies:

“This stud of Exhibit ‘E’ which is fast to the rear side of a shield or plate has a cut or notch on each side of it near the edge adapted to engage with the V-shaped perforation in the spring tongue; aside from this I don’t observe any peculiarity in the construction of this stud. The nature of engagement of the stud with the spring tongue in Complainant’s Exhibit ‘E,’ due to the peculiar formation of the stud, might be described as positive; it is a positive engagement as a hook is a positive engagement; this is also a positive engagement. When you compare the method of such engagement with the nature of the engagement of the hook plate ‘10’ in Complainant’s Exhibit ‘A’ and ‘C’ with the tongue ‘15,’ there is certainly no functional difference. I am unable to see any practical difference in the nature of the engagement; both devices depend on the maintenance of a certain amount of tension on the belt to keep the two interlocking parts in engagement; both are released by taking off such tension; *both are positive not depending on friction*. I don’t think it would be improper to say that *both might be described as a hook engagement*. The function of the stud in retaining the end of the belt in its proper relation to the plate or shield is precisely the same in both cases. In the case of Complainant’s Exhibit ‘E’ this stud per-

forms the double function of retaining the end of the belt in the proper relation with the plate or shield and engaging with the spring tongue attached to the other end of the belt. Considering the swinging tongue '10' in Exhibit 'A' as being integral with, or a single piece, the stud '13,' this single piece is the equivalent of the stud attached to the rear of the plate or shield in Exhibit 'E.' The function of the spring tongue is the same in each case as far as I can see.

"I have used the terms 'hook,' 'hook-like' or 'hook engagement' to convey the impression of engagement of two interlocking parts of such a character as to require maintenance of tension on these parts to retain them in their engagement one with the other. I consider this to be the essential characteristic of hook engagement. * * * Considering simply the hook itself with the spring tongue of Exhibits 'A' and 'C' and the grooved lug and spring tongue of Exhibit 'E,' I should say they are mechanically equivalent. There is no difference between the function of the stud of Complainant's Exhibits 'A' and 'C' and the stud of Complainant's Exhibits 'E' and 'F' with respect to holding the free end of the belt to the plate or shield. * * *

"For the complete disengagement of the tongue from the stud and through it the plate or shield, a movement of the tongue longitudinal to the stud is necessary. I would say, however, that where the engagement is complete with the sides of the V-shaped slot bearing into the kerfs on the side of the stud, two movements are necessary to effect disengagement, the same as in other types of hooks, one being *transverse* to the axis of the stud, the other *longitudinal* to its axis; the first

being to disengage the sides of the V-shaped slot from the kerfs, the second to free the tongue from the stud and allow it to be withdrawn. This same movement in effect is necessary for any other style of hook that I have in mind. The classes of relative movements entering into disengagement of the spring tongue from the hook in Complainant's Exhibits 'A' and 'C' and the classes of relative movements entering into disengagement of the spring tongue from the stud in Complainant's Exhibits 'E' and 'F' are the same in each case."

It will be noted that Complainant's expert Binckley finds not only corresponding or coincident functions, but corresponding modes of operation, and corresponding construction or mechanical equivalence. When the mode of operation and functions produced and results obtained are substantially the same, what better test can there be of mechanical equivalence? And it is to be borne in mind that this patent is entitled to a broad range of equivalents as follows from the differentiation hereinabove made over the prior patent art.

Now Defendants' experts (Exhibits "E" and "F" being admitted to be substantially the same) [page 48, Transcript] also admit this substantial identity of mode of operation and result obtained and effects produced as between the stud-and-hook of the Spangler patent and the recessed stud of the infringing structures. Monteverde [page 50, Transcript] testifies:

"Now, these kerfs on the studs of both the above-mentioned exhibits ('E' and 'F') are for the purpose of allowing the stud to slide a little further in the slots, and to keep the tongue from longitudinal movement as to the axis of the stud when in contact with the

sides of the stud when within the kerfs. *They also serve as a safeguard to keep the tongue from slipping longitudinally on the stud. Were these kerfs omitted, the engagement and holding capacity would be just as great in one sense, but not in the other; that is to say, omitting the kerfs the tongue might be subject to longitudinal movement as to the axis of the stud, and therefore more likely to come off the stud accidentally. This would not occur by the use of the kerfs.*"

And again under cross-examination [page 51, Transcript] this witness thoroughly establishes our contention as to this identity of means:

"The use of these kerfs produces a much more effectual and positive interlocking engagement. A button-hole in order to enable the button to be passed through it in either direction must be pliable in most cases. I find no pliability in the tongue of Complainant's Exhibits 'E' and 'F,' which would permit it to materially yield so that the ends of the studs outwardly of the kerfs can be disengaged with the tongues by bending the material. The material is metallic and rigid."

Thus the witness admits that he was wrong when he testified [page 51, Transcript] that the interlocking device operated more as do a button and button-hole in their engagement. This witness also admits [page 55, Transcript] that the hook and stud of the Spangler patent are one and the same part, as is the stud of the infringing structures, each such *unitary structure* performing the two functions so identically common to both the Spangler patent and the infringing structures.

Defendants' expert Waterfield testifies further as to this engagement of the spring tongue of the infringing

structures with the stud and the kerfs thereof [page 55, Transcript]:

“The engagement and holding capacity of the stud in the tongue would be as great were these kerfs omitted as it is with the kerfs, but it would be more liable to slip off the stud longitudinally than if the kerfs were there; provided as a sort of safeguard against accidental disengagement.”

The witness denied there was a hook engagement, but testified on cross-examination as follows, admitting the identity of performance and effect of the stud and kerfs with the stud and hook of Spangler [page 56, Transcript]:

“If the kerfs in Complainant’s Exhibits ‘E’ and ‘F’ were removed there would be a positive interlocking engagement between the tongues and the studs. Such engagement would prevent movement between the tongues and the studs in more than one direction. While it is being worn I should say the friction of the slot on the stud would prevent longitudinal movement of the tongue on the stud. If the tension in the belt were eased up that frictional engagement would hold the parts against slipping unless the tension were very loose. When the kerfs are present it is a much safer engagement, and it positively prevents the tongue from playing or slipping along the stud longitudinally of the stud and becoming disengaged from the stud. *As a matter of fact, I judge the kerfs on the studs in Exhibits ‘E’ and ‘F’ are for the same purpose as the hooked end of the plate 10, in the Spangler patent.*”

Defendants’ expert witnesses do not deny the similarity between the infringing and Spangler buckles as to

the action of the cross bars holding the spring tongues in place, and as to the general features of construction and combination, other than those which have been disposed of, out of their own mouths, by the immediately preceding discussion. In summing up the approximate identity of the infringing and patented buckles Complainant's expert Binckley states [page 43, Transcript]:

"In conclusion I wish to state with respect to the functions and uses of the buckles constituting Complainant's Exhibits 'A' and 'C' and Complainant's Exhibits 'E' and 'F' that there is no functional difference in any of the essential elements of the exhibits."

MECHANICAL EQUIVALENCE ESTABLISHED.

When the patented and infringing structures are found to have corresponding parts producing the same effects and as between the elements of which there are no "functional differences" mechanical equivalence is certainly established, even within a range much more narrow than that to which the Spangler patent is entitled in its construction.

ALL SPANGLER CLAIM ELEMENTS FOUND IN INFRINGING DEVICES.

Now as to the very elements of the claim of the Spangler patent itself, we will proceed to point out wherein Appellants infringe not only the Spangler patent, broadly and fairly construed as it should be, but also infringe the claim of the Spangler patent term for term. We present a comparative table of these elements as follows:

Spangler Patent.

1 & 2. A shield or plate provided with a rearwardly disposed bar spaced therefrom.

3. Holding means for connecting the shield or plate with a strap or other device.

4. Of two interlocking elements, one being connected with said shield or plate rearwardly thereof.

5. Holding means for connecting the other of said interlocking elements with a strap or other device.

6. The other of said interlocking elements.

Exhibits "E" and "F" and Bliss Patent.

1 & 2. The same box-like shield and cross bars or lugs in E and F, and parts 1, 4, 5 and 6 of Bliss patent.

3. Studs of E and F and stud 7 of Bliss patent.

4. Stud with kerfs of E and F and stud 7 with recesses or kerfs of Bliss patent.

5. Rivets or equivalent holding means for connecting the free end of the belt with the spring tongues in E and F, and rivets 11 of Bliss patent.

6. Spring tongues in E and F and spring tongue or plate 9 of Bliss patent.

The claim of the Spangler patent has previously been applied specifically to the Spangler patent specification and drawing. As to the remaining portion of the Spangler claim, the adaptation of the spring tongue to be passed between the shield and bar, such spring tongue being provided with an opening, and the first of said interlocking elements being formed

for hook engagement with said spring tongue through said opening, these features have been fully pointed out to exist, and established to exist, in the preceding pages, in both the Spangler patented buckle and the infringing buckles.

And as we have above pointed out that there is in the infringing structures element for element all of the essential and detail parts and features of the Spangler patented buckle as provided for in the disclosure of the Spangler patent, and as each and every element of the Spangler claim finds its counterpart, in terms, in the construction and mode of operation of the infringing structures, to what further extent could it be suggested that Appellee make out a case of infringement? The patent is entitled to a broad interpretation; but, even if construed narrowly, Appellants cannot escape. They are withheld from such escape by a fair comparison, and out of the mouths of their own expert witnesses.

CHANGE OF FORM, ONLY, MADE BY APPELLANTS.

If there be any material contention that any of the functions of the Spangler patent are performed in the infringing structures by a less elaborate or more simple organization (and it cannot be seen that this contention can be validly made; and can only be weakly recognized, if at all, with respect to the stud and kerfs of the infringing structures which are the counterpart of the stud 13 and hooked plate 10 of the Spangler patent), such attempted differentiation cannot avoid infringement. The decision in

Nathan *et al.* v. Howard, 143 Fed. 889,
is directly in point. In that decision, page 893, it is
said:

“Neither the joinder of two elements into one integral
part accomplishing the purpose of both and no more,
nor the separation of one integral part into two, to-
gether doing precisely or substantially what was done
by the single element, will evade a charge of infringe-
ment.

Bundy Mfg. Co. v. Detroit Time Register Co.,
94 Fed. 524, 538, 36 C. C. A. 375;
Dowagiac Mfg. Co. v. Brennen, 127 Fed. 150,
62 C. C. A. 257.

“This principle is even more applicable when the
change made relates to mere matter of form not of
the essence of the invention.”

The law so laid down could have not been a more
apt pronouncement had it been made by the trial judge
in this case. The only change made by Defendants
is one of form not of the essence of the invention.
Even the box-like shield body is appropriated from the
Spangler disclosure, and the whole external appear-
ance as to form is identical, this form-resemblance
running likewise throughout the whole buckle organi-
zation.

This imitation of arrangement and appearance of
parts is an aggravation of infringement. See

Ludwigs v. Payson Mfg. Co., 206 Fed. 60,
et seq. (decided April 15, 1913).

That part of the opinion appearing in the second and third paragraphs on page 65 is particularly pertinent, and a long list of authorities appears in support of this doctrine. Here *compactness* and *ornamental form* were factors, as in this case.

On page 12 of Appellants' brief it is stated that counsel for Appellee loudly declaimed over the iniquity of Defendant Bliss acquiring the information that led to his making the buckle, for which the Patent Office granted him a patent, from the Spangler buckle. We wish to declaim a little further in the same voice and on the same issue.

IV.

BLISS TAUGHT BY SPANGLER AND THEN TAUGHT BUCKLE Co.

The stipulation of April 15, 1913, appearing on pages 90 and 91 of the Transcript, admits that the Defendant Walter B. Bliss is the patentee Walter B. Bliss of the Bliss patent above referred to and appearing at pages 86 to 89 of the Transcript, and that said Letters Patent are owned by the Defendant corporation and were by it owned at the times that the infringing buckles were made and sold by the Defendant corporation, as admitted on the record in the stipulation above referred to. This stipulation also admits that Bliss has been in the employ of or by contract related with or a stockholder in the Defendant corporation, in connection with making and selling such buckles since the issuance of the Spangler patent. We have traced the practical identity of the infringing

buckles with the disclosures of the Bliss patent; and by this stipulation last referred to Bliss is shown to have been in the camp of the Defendant corporation and to have turned over his patent to that corporation. The infringing product of the Defendant corporation therefore follows the teaching of the Bliss patent amplified by such further teaching and coaching as Bliss, an employee or associate of the Defendant corporation, could give. Now where did Bliss get his teaching which resulted in the issuance of the Bliss patent for the slight modifications of the specific structure, with respect to the Spangler patent, which are disclosed therein as above described? Turning to the Transcript, pages 29 and 30, Spangler testifies as follows:

“I first met Mr. Bliss between the 20th and 27th of April, 1910. I went up to Mr. Bliss to have him manufacture some buckles for me. * * * I had him make twenty buckles constructed the same as Complainant’s Exhibit “C” [like the Spangler patent disclosure], except in reference to width, one size being a little wider than the other and some little difference in finish and decoration. I paid for the buckles. I met Mr. Bliss frequently after that. We had many discussions and conversations pertaining to the manufacture of these buckles. He was very much impressed with this buckle Exhibit “C.” He says, ‘A fine thing; I could sell those like hot cakes; college boys will be crazy for that.’ Another time he says that we have been working for years trying to get up a buckle, but that is the finest thing I ever saw.

Then after a certain length of time he said he had a similar idea. *I showed him my patent application on it and from that time on Mr. Bliss was very different, didn't work cheerfully helping me with the buckle from that time on.* He says, 'You mean to tell me you can get a patent on that?' I says, 'I certainly applied for a patent on that.' He never mentioned the fact that he had ever seen anything similar at all.

"Mr. Walter B. Bliss made something over seventy buckles for me in all, I guess. About November 1st, 1910 [after the issuance of the Spangler patent], he notified me he couldn't make any more for me, but he did make some more by having them ordered through Mr. Ross. He made some of these buckles after the issuance of the patent in suit." [Page 31, Transcript.]

And it is to be remembered that the Defendant Bliss never took the stand to dispute this testimony, to explain it, nor in any way to explain any of his relations with Spangler or with the Defendant corporation or with these buckles in their exploitation.

The witness Gilbert testifies as to this Spangler-Bliss relation [pages 33 to 35, Transcript]:

"I know the defendant Walter B. Bliss. I first met him about five years ago. The first time that I went up to Mr. Bliss was to get him to make that shell buckle that Mr. Spangler and I got up together.
* * * That was before I saw Exhibit 'C.' Right after that Mr. Spangler showed me a buckle like Complainant's Exhibit 'C' and asked me if I thought it would sell and I said it certainly was very nice. Mr. Spangler had Mr. Bliss make the first ones for him. I got Mr. Bliss to make up samples for Mr. Spangler.

Mr. Bliss seemed to think the buckles like Complainant's Exhibit 'C' were very nice. I remember talking the buckle over with him and he seemed to think it very nice; in fact, being interested in it I would naturally ask him what he thought about it. He said it was very nice. He afterwards told me he had got out a buckle like that before. He said he had one like that himself. *This was long after the buckle had been on the market.* I should say about three months. *At that time he did not have such buckle, but a little while afterward he did.* The buckle that Mr. Bliss showed me at the time referred to is like this one, but this is somewhat perfected. (Here the witness picks up Complainant's Exhibit 'E.')

* * * Mr. Bliss told me he was going to put them on the market. At one time he wondered whether it infringed or not; of course I didn't know anything about it. I said of course Mr. Spangler is the originator of that particular patent. Then he wondered what he could buy Spangler's patent for, so I went to him and asked him about it, asked him what he would do. Nothing was said for some little time. He said something about selling it out to a company. I said that was rather an unfair thing to do; he ought to work Spangler's patent in with his in the company. He said that if I didn't say anything about it till after he got a company and then he would work in Mr. Spangler's patent. After the time Mr. Bliss first showed me the buckle which you have compared with Complainant's Exhibit 'E' he did not say anything more only he was wondering whether it infringed or not—after he made up quite a few of these buckles

he asked me if I thought I would buy belts from Spangler to help put his buckles on the market.”

BLISS CANNOT CONTEST BROAD CONSTRUCTION OF
SPANGLER PATENT HAVING TAKEN TEACHING OF
ITS INVENTION.

There is in evidence the receipted bill paid Bliss by Spangler for the making of the buckles referred to.

This evidence all shows that Bliss was very much impressed with the Spangler buckle invention and admitted that it was the finest thing he ever saw. It was not until some time after that Bliss said he had a similar idea. He filed his application for the Bliss patent six months, lacking a day, after the Spangler patent was issued. *A year prior to filing his application he had before him the Spangler buckle and had worked upon it and received pay from Spangler for this work.* It wasn't until after the Spangler buckle had been on the market three months that Bliss announced that he had a buckle like it himself. Bliss had made at least twenty of these Spangler buckles before he admitted he had a similar idea. After he found that Spangler had applied for a patent Bliss didn't work as cheerfully. Of course not—he didn't like the impending monopoly in Spangler's favor after he had been working for years trying to get up such a buckle. All of this record proves that Spangler, who put his buckles on the market in June, 1910 [page 28, Transcript], and for whom Bliss made the first of these buckles, was the teacher in this buckle art, and Bliss the pupil. The Bliss patent shows that this teaching was effective. All that Bliss could do was

to make some slight alterations in form, for which the Patent Office generously gave him a very specific patent. Later on, the Defendant corporation became the scholar and Bliss the teacher, but Bliss was only the disciple of Spangler. The Defendant corporation stands in the shoes of Bliss in this matter, having full and complete notice of the prior Spangler invention. As pretty a piece of piracy has scarcely ever been made out in patent infringement. And we must remember, as above, that although Bliss obtained a patent, this did not give him the right to use but merely to exclude others from use. It is eminently proper that Bliss and the corporation be excluded from the use of the master invention of Spangler which necessarily enters into the manufacture, use or sale of the Bliss patented buckle and the admitted infringing buckles Exhibits "E" and "F." Throughout this whole drama there is but one motif, and that is the Spangler invention. Spangler taught Bliss; and Bliss, who made the first buckles for Spangler, thereafter taught the Defendant corporation. Not only therefore did the Defendant corporation have complete and actual notice of the Spangler patent, as required by law, but the message of the Spangler invention with Bliss as the expounder was in the workshop of the Defendant corporation after the Spangler patent issued.

V.

CONCLUSION.

In conclusion we wish to make reference again to the law as laid down by this Court in *Stebler v. River-*

side Heights Orange Growers' Ass'n., *et al.* (*supra*), decided June 12, 1913, which clearly defines the rights of the Appellee Spangler (page 740) as to the range of equivalents to which his invention is entitled; and also on the insufficiencies of anticipation (page 738), (which insufficiencies, as in that case, are found in the case now at bar). Quoting further from that decision, and from the decision in Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498. 504, 53 C. C. A. 230, 236:

"The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the *substance* of the plaintiff's patent. The question is, not whether the addition is material, or whether the omission is material, *but whether what has been taken is the substance of the invention.*"

Nothing material has been omitted by the Defendants from, or added by the Defendants to, the gist and kernel and substance of the Spangler invention. What has been taken is the very *substance of the invention*. In addition to this substance, the very dress and appearance have been followed, aggravating the infringement.

The fact that a patent issued to Bliss does not raise any presumption against infringement. In *Stebler v. Riverside Heights Orange Growers' Ass'n and Parker* (*supra*), Parker, the decision shows, had a patent and its subject infringed the patent in suit. (And see *Hermann v. Youngstown Car Mfg. Co.*, *supra*.)

The grounds of anticipation urged against the Spangler patent are about as germane to the invention

as the letters of the alphabet are to a literary composition, as an anticipation of or suggestion of the import and meaning and essence of the same. There is a query which naturally presents itself, in view of the respect paid by Appellants to the prior art—that is, why did they not manufacture the Graves buckle or the Koopman buckle or the Busch buckle or the Goldsmith buckle or the Latta buckle? The patent on each one of these buckles has expired. No, the market never had the right buckle until Spangler offered it. We contend that Spangler alone is entitled to supply the demand.

The facts above presented, taken together with the remainder of the record in the case, and the law as it stands today pertinent to such record and facts, and the unavoidable conclusions to be drawn from the record and such facts, are all respectfully submitted with confident solicitation that the decree of the lower Court be not reversed, but rather be affirmed in each and every respect.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,
Solicitor and Counsel for Appellee.

No. 2370.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Walter B. Bliss and Fresno Mono-
gram Adjustable Buckle Com-
pany, a corporation,

Appellants,

vs.
George P. Spangler,

Appellee

APPELLANTS' REPLY BRIEF.

Counsel for appellee claims that there is infringement in the buckle of the Bliss patent and in buckles Exhibits E and F on the ground of identity of structure and function. He quotes his expert Binsckley's testimony to show identity of function and undertakes to bring into the case an element not found in the claim, to-wit, "holding the butt end of the belt to and rearwardly of the shield and flat against it." (P. 25.) The cross bar b of Busch does the same thing.

The identity of structure can not be established by results alone. Walker states that there are two tests of equivalency: 1. Identity of function. 2. Substantial identity of way of performing that function.

See 362 Walker on Patents, 4th Ed., p. 315.

That there is neither identity of structure or in function between the cross bar 8 of Spangler's patent and the cross bar of Exhibit E and the lugs of Exhibit F, which Binckley testifies are the equivalent of bar 8, seems to us most clear. The bar of E and lugs of F simply guide the tongue into engagement with the stud. Remove the bar of E and lugs of F and the buckle holds the ends of the belt connected as well as before. Remove bar 8 and Spangler's buckle will not work at all. On page 27, Record, Spangler says:

"If the transverse bar (bar 8) were omitted it wouldn't work at all; the parts would work loose."

As we can remove this bar and these lugs and our buckle will work equally well without them, this testimony of Binckley and the claim of equivalency as to these parts is refuted.

The stud on the back of the shield in Exhibits E and F is not the equivalent of the stud of Spangler's buckle. The arrangement of parts is different. The construction is different in this: the studs of E and F have kerfs; Spangler's stud has none. Spangler's stud simply holds one end of the belt connected to one of his interlocking elements, to-wit, the swinging tongue. The stud of E and F hold one end of the belt to the shield and forms one of the interlocking elements. The kerfs of the stud hold the tongue against longitudinal movement along the axis of the stud until the slot in the tongue reaches a point where it is as wide as the diameter of the stud. Without the kerfs there is as much holding power to keep the ends of the belt together. The functions of the two studs and their connection

to different parts show that one is not the equivalent of the other.

The kerfs of the stud of Exhibits E and F are not the equivalent of the hook on the end of Spangler's swinging tongue. Take that hook off and there is nothing to connect the parts. Take the kerfs out and the parts will hold equally well, but the danger of accidental separation is greater.

There is absolutely no equivalent in E and F for the cross bar on which Spangler's swinging tongue is mounted, nor is there any equivalent for such swinging tongue.

In *Seymour v. Osborne*, 11 Wall. 678, 20 L. C. P., at page 42 L. C. P. the court says:

"Actual inventors of a combination of two or more ingredients in a machine, secured by letters patent in due form, are entitled, even though the ingredients are old, if the combination produces new and useful results, to treat every one as an infringer who makes and uses or vends the machine without their authority. (Authorities.)

They cannot, however, suppress subsequent improvements which are substantially different, whether the new improvements consist in a new combination of the same ingredients, or of the substitution of some newly discovered ingredient, or some old one performing some new function not known at the date of the patent as a proper substitute for the ingredient withdrawn from the combination constituting their invention."

In *American Can Co. v. McGuiness*, 156 Fed. 184, the court says:

“Where a patent is not a pioneer invention, but for a combination of old elements, the range of equivalents is restricted to those which perform the same function in the same way.”

This case was affirmed, 162 Fed. 1006.

The swinging tongue with the hook on the end thereof and the cross bar on which it is mounted are all left out of Exhibits E and F and nothing substituted therefor. Spangler's tongue on the end of the belt has a transverse slot. The tongue of Exhibits E and F and of the Bliss patent has a tapered longitudinal slot. This last tongue will not work in the Spangler structure and Spangler's tongue will not work in the other structures, hence the tongues are not equivalent. As stated in our opening brief Bliss and the Buckle Co. did not use anything that Spangler taught. Hence it was not necessary to rebut any testimony about Bliss' knowledge of the Spangler buckle.

Infringement is a tort. The law presumes innocence. Neither an employee of, a stockholder in, or an officer of a corporation is liable to an action for infringement for an act done by the corporation in which he did not participate.

Folwell v. Miller, 145 Fed. 495.

For the reasons above stated and those stated in our opening brief the judgment of the lower court should be reversed.

G. E. HARPHAM,
Solicitor for Appellants.

No. 2370.

UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

WALTER B. BLISS and FRESNO MONO-
GRAM ADJUSTABLE BUCKLE COMPANY,
a corporation,

Appellants,

VS.

GEORGE P. SPANGLER,

Appellee.

APPELLEE'S BRIEF IN REPLY TO
APPELLANTS' REPLY BRIEF.

On permission given at the time of argument,
this reply brief is filed.

Appellee's brief will be found to dispose, generally, of all the ninth-hour labors of Appellants reflected in their fragmentary reply brief.

But there are a few features of the case which the points raised in this Appellants' reply brief particularly set out in the front for final disposition.

First, Appellants again refer to the prior art, by

which, and by only which, they seek to attack a fair and warrantably liberal interpretation of Appellee's patent and the claim thereof. This prior art, *purely paper prior art*, does not contain a single structure anticipatory of Appellee's invention. On the argument Appellants relied largely upon the Busch patent (page 64, Transcript) and the Graves Patent (page 71, Transcript). These patented devices might only "by process of modification, reorganization or combination/ be made to accomplish the function performed by the device of the patent." The quotation is from a decision of this Court in the case referred to on argument (page 19, Appellee's brief.) These prior patented attempts, *no proof of use of any of which is shown in the record*, are disposed of on pages 14 to 18, inclusive, of Appellee's brief. Neither the Busch device nor the Graves device can operate as do Appellee's patented device and the infringing structures of Appellants; and neither *reflects the inventive idea*. Neither is the same thing.

As to the Graves Patent (see particularly last paragraph page 17 and upper portion page 18, Appellee's brief.)

Appellee's patented device and Appellants' infringing structures have *the same elements, performing the same functions, in substantially the same manner*. (See pages 24 to 27 and 34 to 36 inclusive, Appellee's brief.) No further test of infringement can be required.

The Appellants only made a change in form. That is an aggravation of infringement (pages 36 to 38, Appellee's brief.)

The Appellants as stated at the argument attempted to circumvent the inhibition of the decree, and left off the transverse bar or equivalent lugs beneath which, in Complainant's exhibits "E" and "F" the spring tongue is passed. As the kerfs on the stud produce shoulders *acting to guide the spring tongue into place and to hold it down and to the butt end of the belt*, as well as acting to produce a hook engagement between the stud and the slotted spring tongue, the Special Master reviewing the original record, on reference, and on further proofs, found that the altered buckle *also infringed the Appellee's patent*; and the Judge of the Trial Court, on exceptions argued, confirmed the Special Master's report so finding. This is res adjudicata as well as the issues specifically covered in the Transcript, and this finding is clearly supported by

Nathan et al. v. Howard, 143 Fed. 889, 893, quoted from at page 37, Appellee's brief.

In effect therefore, the Appellants *doubly* infringe by using the transverse bar or lugs as well as the stud with the kerfs for performing the functions mentioned. (See page 27, Appellee's brief.)

In "E" and "F" other lugs are provided for aiding in holding the belt against the shield, in lieu of the

pin or bar 9 of the Spangler patent. Stud and kerfs take the place of Spangler's hooked studded tongue. The spring tongues of E and F and of the Spangler patent are all slotted and have hook engagement with the *unitary* means carried by the shield and holding the two ends of the belt together and one of them flat against the back of the shield *in compact, neat and unobtrusive arrangement and in a box-like containing shield-structure*. Slight differences in spring tongue and slot design and hook design, and other features of design, are only attempted evasions of the patent in suit.

The invention is appropriated. As to this and the proper interpretation of the patent in suit, see *Stebler v. Riverside Heights Orange Growers Assn., et al.*, the decision of this Court above referred to, and as discussed on pages 43 to 45, Appellee's brief.

This appeal is from an interlocutory decree granting an injunction. No distinction can be made as between any of the Appellants on this head. *Any* act of infringement by them or either of them, of any nature, comes within the decree, at least as far as the injunction is concerned. Spangler and Gilbert proved that Appellant Bliss was taught by Spangler, and he taught the Appellant Buckle Company and worked with it.

The Appellants have pirated and by corporate oppression have practically ruined the business of the Appellee, a man of meagre means and limited busi-

ness equipment and who cannot hope for further capital while his proper field is wrongfully invaded. See pages 30 and 31, Transcript.

It is submitted that for the further reasons above advanced the decree of the Trial Court should, as solicited in Appellee's opening brief, be affirmed in each and every respect.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,
Solicitor and Counsel for Appellee.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Walter B. Bliss and Fresno Mono-
gram Adjustable Buckle Co., a
corporation,

Appellants,

vs.

George P. Spangler.

PETITION FOR REHEARING.

*To the Honorable the Justices of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The appellants respectfully petition for a rehearing of the above entitled cause on the following grounds:

1. That in the decision heretofore rendered by Your Honors you overlooked the fact that an infringement is a tort, and the evidence must establish the fact of the commission of such tort, and that a presumption of innocence pertains to the acts of the defendants which must be overcome by proof.

As the bill charges a joint tort of all three defendants the proof that there was a joint tort of two of

the defendants does not support the allegations of the bill or the decree of the court. The stipulation that Bliss made one or more buckles subsequent to the issuance of the Spangler patent does not establish that he did it in connection with the other defendants as a joint act, nor entitle the issuance of a writ of injunction against him. The other defendant, the Buckle Company, is not responsible for his sole act.

That he was connected with the Buckle Company as an employee does not establish any responsibility for the manufacture.

Walker on Patents says in Sec. 403, Fourth Edition: "A mechanic who, when working for wages, makes or uses a patented thing at the command of his employers, is not liable to an action at law on that account. A decree for an accounting of profits would not be proper in such case because a mechanic cannot be said to make any profits from such infringement."

Bliss is presumed to be innocent of any tort until the contrary is shown. The innocent construction of the stipulation is that what he did was as an employee of the Buckle Company, and as such employee he is not liable for damages, nor did he make any profits from the doing of the act.

Neither the stipulation nor testimony connect Bliss or the Buckle Company with any joint act of all three defendants.

Therefore the proofs do not support a joint decree against all three defendants, and the pleadings do not admit of any but a joint decree.

2. In deciding that defendants' buckle employs all the elements of plaintiff's patent in all essential and material particulars in practically the same way Your Honors must have overlooked this important fact. That in defendants' buckle one essential and important element of the Spangler buckle, to-wit, a swinging tongue with a hook on the end thereof has been omitted from defendants' buckle.

Another essential difference between Spangler's buckle and defendants' buckle lies in the fact that in the Spangler buckle the cross bar under which the Spring tongue must be passed is an essential element and that his buckle will not work without it. (Spangler's testimony, last paragraph, page 27.) This bar is bar 8 of Spangler's patent.

The parts of defendants' buckle which Binckley, plaintiff's expert, says are the mechanical equivalents of bar 8 are the lugs under which the ends of defendants' buckle tongue is passed when the tongue is engaged with the stud. These lugs are not essential to the operation of defendants' buckle. Counsel demonstrated by a model in open court that they were not necessary in defendants' buckle, hence they do not perform the same function as Spangler's cross bar, and this shows that another essential element of the Spangler buckle is wanting in defendants' buckle.

In the decision of Your Honors you state that "the interlocking devices in plaintiff's patent consist "of a hook on the swinging tongue which engages a "slot on the spring tongue.

“In the Bliss patent the devices consist of a stud
“attached to the shield underneath with kerfs or a
“head and a plate attached to the loose end of the belt
“containing a slot of different shape. That one of
“these engaging devices is a hook and the other a pin
“or stud and one a slot extending cross-wise of the
“spring tongue and the other a converging slot ex-
“tending longitudinally with the plate or tongue it
“seems to us can make no material mechanical differ-
“ence in the engagement. They perform the same
“function for all practical purposes in practically the
“same way.” (Page 10 and 11, opinion.)

Now right here is where Your Honors are in error. In addition to the hook and spring tongue of Spangler's buckle, to make the fastening secure between the parts requires the cross bar 8 under which the spring tongue slips, and which is made an element of the claim. In the Bliss buckle no such bar is necessary to hold the parts from separating while in use. The lugs of defendants' buckle, which are situate in the same position as cross bar 8, are simply guides to quickly position the tongue so the slot therein will pass over the stud. It is the fact that in defendants' buckle the stud is on the back of the shield and not on the face of a swinging tongue that enables a positive engagement between the parts without the use of the cross bar as a part of the holding elements.

Your Honors concede that all the elements of Spangler are old except the hook on the end of the swinging tongue and the cross bar under which it passes and which keeps the stud on the swinging

tongue from separating from the end of the belt. In defendants' buckle all the parts are old except the kerfs in the stud and the V-shaped slot in the tongue.

From the art of record Spangler did not do anything that had not been done before. He was simply an improver. He did the same thing, say, in a better manner, but he did it by the arrangement of his parts in a particular manner. He did not invent the box-like shield, or if he did he gave it to the public and the Buckle Company had a perfect right to use it.

The Bliss buckle is an arrangement of parts which effect the same result as the Spangler buckle, but that result is, in part, brought about by different old elements arranged in a different way from Spangler's elements and with fewer parts.

In *Miller v. Eagle Manufacturing Co.*, 151 U. S. 304, 38 L. C. P. at p. 131, the Supreme Court says:

"Tested by this rule and in view of the prior devices and the great variety of springs in use previous to the granting of his patent, Wright cannot be treated as a pioneer in the art. Neither can he, nor his assignee, be allowed to invoke the doctrine of equivalents, such as the courts extend to primary inventions, so as to include all forms of spring devices and adjustments which operate to perform the same function, or accomplish the same result. * * * The specific device described in and covered by the Wright patent could not be used in the appellants' combination, nor the appellants' spring in the appellee's combination. This interchangeability, or non-interchangeability, is an im-

portant test in determining the question of infringement." *Prouty v. Ruggles*, 41 U. S., 16 Pet. 336 (10.985); *Brooks v. Fiske*, 56 U. S., 15 How. 212 (14.665); *Eames v. Godfrey*, 68 U. S., 1 Wall. 78 (17.547).

Spangler's spring tongue would not work in defendants' buckle, nor would the tongue of defendants' buckle work in the Spangler buckle.

It is thus apparent that the two devices are not mechanical equivalents.

In affirming the judgment of the lower court Your Honors have overlooked the principle of patent law established by a long line of decisions and set forth in *Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co.*, 168 Fed., at page 276, as follows:

"And where an art is crowded and so old that no pioneer patent exists therein, and many inventors have conceived and made machines, combinations, and improvements in it which accomplish the desideratum with varying degrees of success, each is entitled to his own machine or combination or improvement, so long as it differs from those of his competitors and does not include theirs." *Railway Co. v. Sayles*, 97 U. S. 554, 556, 24 L. Ed. 1053; *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Stirrat v. Excelsior Mfg. Co.*, 10 C. C. A. 216, 217, 61 Fed. 980-81; *National Hollow Brick Beam Company v. Interchangeable Brake Beam Company*, 45 C. C. A. 544, 563, 106 Fed. 693, 712.

Analyzed again: In the Spangler buckle, to make a positive and reliable engagement between the ends of the belt there must be: 1, a shield; 2, a cross bar on the back thereof; 3, a swinging tongue with a hook on the end; 4, a stud on the face of this tongue; 5, a spring tongue with a slot. In defendants' buckle there must be: 1, a shield; 2, a stud on the back having kerfs in the sides near the end; and 3, a tongue with a slot. These parts are all differently arranged, and while they accomplish the same results, they do it by a different arrangement of old elements, which all the authorities decide is patentable, and we respectfully submit that it avoids infringement.

For these and other reasons which could be urged a rehearing should be granted.

G. E. HARPHAM,
Solicitor for Appellants.

I, G. E. Harpham, do hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

G. E. HARPHAM,
Counsel for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CALIFORNIA NAVIGATION AND IM-
PROVEMENT COMPANY, a Corporation,
Appellant,

vs.

AUGUST GENECCO,

Appellee.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

FILED

MAR 27 1914

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CALIFORNIA NAVIGATION AND IM-
PROVEMENT COMPANY, a Corporation,
Appellant,
vs.
AUGUST GENECCO,
Appellee.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
Northern District of California, First Division.*

ADMIRALTY—No. 15,373.

ARTHUR GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT COMPANY, a Corporation,
Respondent.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court,—

Sir: Respondent herein having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of this Court entered herein in favor of libellant and against respondent, you are hereby requested to prepare and certify the apostles on appeal to be filed in said Appellate Court on or before the 18th day of February, 1914 (it having been ordered by the Court that appellant should have to and including said day within which time to procure to be filed in said Appellate Court the apostles certified by the Clerk of the District Court as in Rule 12 of the "Rules in Admiralty" of said Appellate Court provided); said apostles on appeal to be prepared in accordance with Rule 4 of said "Rules in Admiralty," except that all exhibits introduced in evidence at the hearing before the above Court shall be filed in the Appellate Court in their original forms and to include in their

proper order the following papers and documents,
to wit: [1*]

1. All the matters prescribed and mentioned in Admiralty Rule No. 4, Section No. 1, of said Appellate Court.

2. Libel of Arthur Genecco.

3. Answer to said Libel.

4. All of the testimony adduced at the hearing before said District Court.

5. Opinion and Decree of the District Court.

6. Notice of Appeal.

7. Stipulation and order extending time, filed January 19, 1914.

8. All the exhibits introduced in evidence at the hearing of said cause before the District Court, to be filed in their original forms.

9. Assignment of Errors.

Dated January 19th, 1914.

METSON, DREW & MacKENZIE,
Proctors for Appellant.

[Endorsed]: Filed Jan. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page number appearing at foot of page of original certified Record.

Statement of Clerk U. S. District Court.

*In the District Court of the United States in and
for the Northern District of California, First
Division.*

No. 15,373.

AUGUST GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION AND IMPROVE-
MENT COMPANY, a Corporation,
Defendant.

PARTIES.

LIBELANT: August Genecco.

DEFENDANT: The California Navigation and Im-
provement Company, a Corporation. [3]

PROCTORS.

For LIBELANT: H. W. Hutton, Esquire, San
Francisco, California.

For DEFENDANT: Messrs. Metson, Drew and
MacKenzie (R. G. Hudson, Esquire, appearing
in the case), San Francisco, California.

1913.

February 4. Filed verified Libel, to recover
damages. Issued Citation for the
appearance of the California
Navigation and Improvement
Company, and which said Cita-
tion was afterwards on the 24th
day of February, 1913, returned

and filed without any return being made thereon.

February 25. Filed Exceptions of the California Navigation and Improvement Company to the Libel filed herein.

March 8. The Exceptions to the Libel, filed herein, this day came on for hearing, in the above-entitled Court, before the Honorable Wm. C. Van Fleet, Judge, and after argument by the Court Ordered said Exceptions overruled.

March 21. Filed Answer of the California Navigation and Improvement Company to the Libel. [4]

November 12. The above-entitled cause this day came on for hearing in the District Court of the United States for the Northern District of California, First Division thereof, in its courtroom, in the City and County of San Francisco, before the Honorable M. T. Dooling, Judge, and after the taking of testimony, etc., the matter was submitted to the Court for decision.

December 3. Filed Opinion, in favor of libelant in the sum of \$621.80, and costs.

December 15. Filed Decree.

December 20. Filed Notice of Appeal.

December 27. Filed Reporter's Transcript of Testimony, etc.

December 30. Filed Bond for Costs and Superse-
deas, in the sum of \$1,750.00, with
the Fidelity and Deposit Company
of Maryland, as Surety.

1914.

January 24. Filed Assignment of Errors. [5]

*In the District Court of the United States, in and for
the Northern District of California, First
Divison.*

IN ADMIRALTY.

AUGUST GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION AND IMPROVE-
MENT CO.,

Defendant.

Libel for Wages.

To the Honorable J. J. DE HAVEN, Judge of said
Court:

The Libel of August Genecco, of said District, ves-
sel owner and contractor, against California Naviga-
tion and Improvement Co., a corporation, also of said
District, ship owner and operator, in a cause of dam-
ages, arising from collision, civil and maritime, al-
leges as follows:

I.

That on all of the dates and times herein men-
tioned, the defendant above named was and now is a
corporation, organized and existing under and by

virtue of the laws of the State of California, and on all of said dates and times it was and now is the owner and operator of a certain American stern-wheel steam vessel, known and named as the "J. D. Peters."

II.

That on all of said dates and times the libellant herein was and now is the owner of a certain gasoline launch, which said launch when in operating condition was of the value of one thousand (\$1,000.00) dollars, or thereabouts.

III.

That on the 15th day of December, 1912, the said launch was lying securely tied to a barge called the "Stocktonia," which said barge was lying tied to a wharf on the banks of a slough, at the City of Stockton, in the County of San Joaquin, in the State of California, [6] the said slough being navigable waters of the United States of America, and of the State of California, at said time, and the said launch and barge being afloat on the said waters, when the defendant came up with the said steam vessel "J. D. Peters," and carelessly and negligently ran into the said launch, and with said steam vessel crushed and broke said launch, and so badly damaged the same that libellant has since been compelled to repair the same at an expense to him of the sum of \$400.00 dollars, and he has ever since lost the use of said launch, and will for a period of 15 days hereafter.

IV.

That the said amount so expended by libellant for the repair of said launch was the reasonable cost

thereof, and the reasonable value of the use of said launch at said time was and is the sum of \$6.00 dollars per day, and by reason of the negligence of the defendant as aforesaid, libellant has been damaged in the aggregate of said sums.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore libellant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said California Navigation and Improvement Co., and that it may therein be cited to appear and answer under oath all and singular the premises aforesaid, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid with costs, and interest, and that libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

AUGUST GENECCO,

Libellant.

H. W. HUTTON,

Proctor for Libellant. [7]

United States of America,

Northern District of California,—ss.

August Genecco, being first duly sworn, deposes and says as follows:

I am the libellant above named; I have read the foregoing libel and I know the contents thereof, and the same is true of my own knowledge except as to the

matters therein stated on information and belief and as to those matters I believe it to be true.

AUGUST GENECCO.

Subscribed and sworn to before me this 16th day of January, 1913.

[Seal]

CHARLES DE LEGH,
Notary Public in and for the County of San Joaquin,
State of California.

[Endorsed]: Filed Feb. 4, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,373.

AUGUST GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT CO.,

Defendant.

Exceptions to Libel.

EXCEPTIONS OF DEFENDANT.

To the Honorable Judge of the District Court of the
United States, in and for the Northern District
of California, First Division:

For exception of the California Navigation & Im-
provement Co., a corporation, defendant, the said
defendant alleges that the said libel is informal and
insufficient as follows:

FIRST EXCEPTION.

That said alleged libel does not state facts sufficient to entitle the libellant to the relief therein demanded or to any relief.

SECOND EXCEPTION.

That said alleged libel is uncertain in this: that the following particulars do not appear upon the face of said libel, neither can the same be ascertained therefrom, to wit:

(a) In what the alleged carelessness and negligence of the steamer "J. D. Peters" consisted. [9]

THIRD EXCEPTION.

That said alleged libel is ambiguous in this: that the following particulars do not appear upon the face of said libel neither can the same be ascertained therefrom, to wit:

(a) In what the alleged carelessness and negligence of the steamer "J. D. Peters" consisted.

FOURTH EXCEPTION.

That said alleged libel is unintelligible in this: that the following particulars do not appear upon the face of said libel neither can the same be ascertained therefrom, to wit:

(2) In what the alleged carelessness and negligence of the steamer "J. D. Peters" consisted.

WHEREFORE said defendant, California Navigation & Improvement Co., prays that the said libellant take nothing by virtue of this proceeding and

that the defendant be hence dismissed with its costs.

METSON, DREW & MacKENZIE,
Proctors for Defendant,
San Francisco, California.

Due service of a copy hereof admitted February
25, 1913.

Proctor for Libellant.

[Endorsed]: Filed Feb. 25, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

[Order Overruling Exceptions to Libel, etc.]

At a stated term of the District Court of the United
States of America, for the Northern District of
California, First Division, held at the court-
room thereof, in the City and County of San
Francisco, on Saturday, the 8th day of March,
in the year of our Lord One Thousand Nine
Hundred and Thirteen. Present: The Honor-
able WM. C. VAN FLEET, Judge.

#15,373.

GENECCO

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT CO.

The exceptions to the libel herein this day came on
for hearing, and after hearing proctors, by the Court
ordered that said exceptions be, and the same are
hereby overruled, and respondent granted ten days
to answer the libel herein. [11]

*In the District Court of the United States, Northern
District of California, First Division.*

AUGUST GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT COMPANY, a Corporation,

Defendant.

Answer to Libel.

To the Honorable Judge of the District Court of the
United States for the Northern District of Cali-
fornia, First Division.

The California Navigation & Improvement Com-
pany, a Corporation, for its answer to the libel in
the above-entitled proceeding answers and alleges as
follows:

I.

Admits the allegation of paragraph I of said libel.

II.

Answering paragraph II of said libel this defend-
ant alleges that it has no information or belief as to
the same sufficient to enable it to answer the allega-
tions thereof, and placing its denial on that ground,
it denies that on all or any of said dates or times
libellant herein was and now is or was or now is the
owner of a certain or any gasoline launch, which
said launch, when in operating condition or other-
wise, was of the value of One Thousand Dollars, or
thereabouts or of any value whatsoever or at all.

III.

Answering paragraph III of said libel defendant denies that on the 15th day of December, 1912, said launch was lying securely or at all tied to a barge called the "Stocktonia"; denies that said barge was lying tied to a wharf on the banks of a slough at the City of Stockton in the County of San Joaquin, State of California; denies that defendant came with the said steam vessel "J. D. Peters" and carelessly and negligently or carelessly or negligently, or at all carelessly or negligently, ran into the said launch; denies that said steam vessel so badly or at all damaged the said launch that libellant has since or at all been compelled to repair the same at an expense to him of the sum of Four Hundred Dollars or any other sum whatsoever or at all; denies that said libellant has ever since or at all lost the use of said launch, and denies that said libellant will lose the use of said launch "for a period of fifteen days hereafter," or for any other period whatsoever.

And further answering said paragraph III of said libel, defendant alleges that on the evening of December 15th, 1912, the said launch referred to in said paragraph was moored alongside a certain barge at the City of Stockton, State of California; that the said launch had not been assigned to said or any berth by the City Wharfinger of said City of Stockton; that the said launch was so moored to the said barge that it, the said launch, was obscured by the shadow of the barge in such a manner that it was impossible to see the said launch until too late to avoid a collision between said launch and approach-

ing craft; that neither the said barge nor the said launch had on the evening of said December 15th, 1912, and at the time of the collision in said libel referred to, any light or lights exposed for the purpose of warning and guiding other vessels which might be navigating in the waters in said libel referred to. [13]

That the said steamer "J. D. Peters" immediately after leaving her regular home moorings at the said City of Stockton on the evening of said December 15, 1912, collided with the said launch. That at the time of said collision the said steamer "J. D. Peters" was being carefully and in all respects properly navigated by the officers in charge thereof. That it was impossible by reason of the facts hereinbefore alleged for the officers and crew who were in charge of and were handling the said steamer "J. D. Peters" to see or observe the said launch until too late to avoid contact between the said steamer and the said launch.

IV.

Answering paragraph IV of said libel defendant denies that the said amount alleged to have been expended by libellant for the alleged repair of said launch is the reasonable cost thereof. And in that behalf defendant alleges that the total damage, if any, sustained by the said launch by virtue of its contact with said steamer was not in excess of the sum of One Hundred Dollars. Defendant denies that the reasonable value of the use of said launch at said time or any time was, and is or was or is the sum of Six Dollars per day. Denies that by reason of the or any negligence of the defendant, as aforesaid, or at

all, or by reason of any negligence or act or omission of defendant, libellant has been damaged in the aggregate of said sum or in any sum whatsoever or at all.

That all and singular the premises are true.

WHEREFORE, defendant prays that this Honorable Court would be pleased to pronounce against the libel aforesaid and to condemn the libellant in costs and otherwise at law and justice to administer in the premises.

C. D. CLARKE,
Proctor for Defendant. [14]

State of California,
City and County of San Francisco,—ss.

C. D. Clark, being first duly sworn, deposes and says: That he is an officer, to wit, The Vice-president of the California Navigation & Improvement Company, defendant corporation above named. That he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to such matters as are therein stated on information or belief, and as to those matters he believes it to be true.

C. D. CLARK.

Subscribed and sworn to before me this 21st day of March, 1913.

[Seal]

C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California.

Due service of a copy hereof admitted March 21st, 1913.

Proctor for Libellant.

[Endorsed]: Filed Mar. 21, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the District Court of the United States, for the Northern District of California.

No. _____.

Vol. _____

ARTHUR GENECCO,

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT COMPANY.

Testimony Taken in Open Court.

WEDNESDAY, NOVEMBER 12TH, 1913.

REPORTER'S TRANSCRIPT.

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CHARLES R. GAGAN,

EDWARD W. LEHNER,

Official Reporters,

329 P. O. Building. [16]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

Honorable MAURICE T. DOOLING, Judge.

AUGUST GENECCO

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT COMPANY.

WEDNESDAY, NOVEMBER 12TH, 1913.

COUNSEL APPEARING:

For the Libellant: H. W. HUTTON, Esq.

For the Respondent: ROY G. HUDSON, Esq.

Mr. HUTTON.—This is an action for damages for a collision that happened between the gasoline launch “Stocktonian” and the steamer “J. D. Peters,” on the 15th day of December of last year, at Stockton.

The answer admits the incorporation of the defendant, and also that it was the owner and operator of the steamer “J. D. Peters” at the time, also admits that she collided with his vessel. It denies, for want of information and belief, the damage, and also the ownership of the “Stocktonian.”

We expect to prove that the “Stocktonian” was lying tied to a barge on the evening in question, and

(Testimony of August F. Genecco.)

that the "J. D. Peters" backed down and upon this vessel and struck her and seriously injured her.
[17*—1†]

[Testimony of August F. Genecco, for Libelant.]

AUGUST F. GENECCO, called for the libelant, sworn.

Mr. HUTTON.—Q. Where do you reside?

A. 320 East Church Street, Stockton, California.

Q. And that has been your residence how long?

A. About six years at that one place.

Q. What business are you engaged in?

A. I am engaged in the general freighting business on the San Joaquin River, and also in the liquor business.

Q. How long have you been in the freighting business? A. About three years, or a little better.

Q. In December of last year, did you know a gasoline vessel called the "Stocktonian"?

A. Yes, sir.

Q. Whose property was she at that time?

A. She was my property.

Q. How long had you owned her?

A. I owned the "Stocktonian" somewhere between 3 and 4 years.

Q. Were you using her during the month of December of last year, up to the 15th? A. Yes, sir.

Q. In what business?

A. Hauling onions, and also sand, and whatever

*Page-number appearing at foot of page of certified Apostles.

†Original page-number appearing at top of page of Testimony as same appears in Certified Apostles.

(Testimony of August F. Genecco.)

we could get to haul.

Q. In connection with the "Stocktonian," did you use any other vessel or any other floating structure?

A. Before I was damaged—is that what you mean?

Q. Were you using anything besides the "Stocktonian"? A. No, not at the time.

Q. Were you using a barge?

A. Yes, I was using a barge.

Q. You were using a barge? A. Yes, sir.

Q. In what method would you use the barge?

Mr. HUDSON.—If your Honor please, this is an action for damages to a launch, a collision between a launch and our vessel. [18—2] I do not see what this has to do with the matter.

The COURT.—This may explain the circumstances of the accident.

Mr. HUTTON.—It is one of the circumstances of the case.

The COURT.—The objection will be overruled.

Mr. HUTTON.—Q. You say you used the "Stocktonian" and a barge? A. Yes, sir.

Q. In what method? Where did you bring your sand from? A. From the San Joaquin River.

Q. How far from Stockton?

A. About 3½ miles where I got the sand.

Q. On the 15th of December, 1912, had the "Stocktonian" been away from Stockton?

A. On the 15th, yes, sir.

Q. Do you know what time she returned?

A. She returned sometime in the afternoon; I was not present when she returned.

(Testimony of August F. Genecco.)

Q. When the barge and the "Stocktonian" returned to Stockton, where did they use to lie?

A. Just at the front of the Ames-Harris factory there, on Webber Point and Stockton Channel.

Q. Alongside of anything, or anywhere?

A. Alongside the wharf; I have the wharf space hired there.

Q. Had you a berth there at that time?

A. Yes, sir. I had 60 feet.

Q. How long had you that berth?

A. I could not just recall how many months, for several months; somewhere around 5 or 6 months, maybe, or maybe a little less.

Q. Do you know the steamer "J. D. Peters"?

A. Yes, sir.

Q. Had she a berth near where your barge used to lie? A. Not that I know of.

Q. Where did she lay there? Did she ever come up the river at all?

A. Well, she passed by; she has a berth up above [19—3] there, and one right across facing my berth.

Q. She had a berth in the same channel?

A. In the same channel, yes, sir.

Q. In the same waters? A. Yes, sir.

Q. How far away from where your berth was?

A. One berth at the head of the channel is about in the neighborhood of a little over two blocks; somewhere near that; I never measured it.

Q. Were there any electric lights around in that vicinity?

A. Yes, sir; there is an electric light about 75 steps

(Testimony of August F. Genecco.)

from there, with four lights.

Q. From where?

A. From my barge, and a 100-foot tower; that is what they call it. I never measured it, but that is what they call it.

Q. State whether or not those electric lights shown down on your barge.

A. Well, they are not there present at the time—

Q. (Intg.) I mean, when they are lighted.

A. Oh, yes, when they are lighted they show there very plain.

Q. Did anything happen to the “Stocktonian” on the night of the 15th of December, 1912?

A. Yes, sir; the engineer that I have, Mr. Jose—

Q. (Intg.) I don't care about you telling what he told you, but what did you see?

A. I did not see the damages until the 16th of December.

Q. At what time?

A. It was about 7 o'clock when I saw the damage. I called on Mr. Prior, the Assistant Manager—

Q. (Intg.) I don't care about that; what was the damage?

A. The damage was that the cabin was totally wrecked and squashed in, and is squashed in the stern of her and caused her to have big cracks in the seams of the planking, where it had to be taken out, it could not be used. [20—4]

Q. You subsequently, then, did you, give her to somebody to repair?

A. Yes, sir.

Q. To whom?

(Testimony of August F. Genecco.)

A. The Banner Island Boat Works, Mr. George Ingersoll.

Q. Where is that place?

A. That is in the McCloud's Lake, City of Stockton.

Q. How long was she under repair?

A. She was under repair. I never turned the launch in there—from the time that I turned the launch in—let me see, somewhere about two months.

Q. Was she under repair two months?

A. Somewhat about that. I received her in February, I believe it was February 9th.

Q. What was the cost of the repairs?

A. I believe it was \$441.80, if I am not mistaken; I believe it was 80 cents.

Q. Were there any repairs done to her in that time except those that were necessitated by this collision?

A. No.

Q. You did not do any extra work on her?

A. No, sir.

Q. How much a day was the "Stocktonian" worth at that time?

A. Well, I estimated it really—sometimes we are hauling one thing and sometimes another, but I really estimated that boat to be worth about \$7.50 per day. That is what I would have to pay if I could find one to cover the labor that that boat would do.

Q. That is the ruling rate for a boat of her character up in Stockton at that time, if you hired one, about \$7.50 a day?

A. Yes, sir, that would be the best I could do.

(Testimony of August F. Genecco.)

Q. Did the "Stocktonian" make \$7.50 a day for you at that time? A. Yes, sir.

Q. Do you know how many days' time you lost in her use by reason of these injuries to her?

A. I lost from December 15th to about February 9th; that is, from the 16th of December. [21—5]

Q. How many men did you use in operating the "Stocktonian"?

A. I used three men on the river, and when I came into town to unload I hired an extra man to help unload.

Q. Were they all on the "Stocktonian" or were some of them on the barge?

A. You mean at the time she was damaged?

Q. No, when you were operating her?

A. Oh, yes, they were all on board.

Q. None on the "Stocktonian"?

A. Not when we were tied up.

Q. I mean when she was going up and down the river?

A. Oh, yes; we have the engineer and sometimes we have two and sometimes we have one.

Q. You operated them jointly and it took three men to operate those boats? A. Yes, sir.

Q. When the barge was in the water and the "Stocktonian" was in the water, and they were both alongside of one another, which was the highest out of the water?

A. I never did measure it; I did not measure it, but the launch is the highest. We had about half a load on the barge and that brings the barge out about

(Testimony of August F. Genecco.)

21½ feet out of the water.

Q. Were all parts of the "Stocktonian" higher than the barge? A. Just the cabin.

Q. Just the cabin?

A. Yes, the cabin, and I don't know whether the hull was above, or not.

Cross-examination.

Mr. HUDSON.—Q. You say you had this launch 3 or 4 years? A. Yes, sir.

Q. Was it new when you acquired it?

A. Yes, sir; when I bought that launch I had it all repaired over new, replanked, and so forth.

Q. It was a second-hand launch when you bought it? A. Yes, sir. [22—6]

Q. You say you used it in hauling?

A. Yes, sir, general freighting on the river.

Q. Had you been using it continuously up to the 15th day of December, 1912?

A. Yes, sir, I just came in that day.

Q. You had been using her every day?

A. Mostly every day.

Q. You say you had been earning \$7.50 a day with that boat? A. Yes, sir; that is what I figure, yes.

Q. And you say that the reasonable value of that launch to you for its use was the sum of \$7.50 a day?

A. That is just about the nearest figure—the reasonable amount, yes, sir.

Q. I show you the original libel filed in this case, and calling your attention to the verification I ask you if that is your signature?

A. Yes, sir, that is my signature.

(Testimony of August F. Genecco.)

Q. At the time you signed that were you familiar with the contents of the libel? A. No, sir.

Q. Had you read it?

A. No, sir, not that I know of.

Q. Had it been read to you?

A. No, sir, not that I know of.

Q. You did not know what matters were set forth and alleged in this libel then?

A. No, sir, I did not.

Q. You state in your verification that "I have read the foregoing libel and know the contents thereof and the same is true of my own knowledge." Did you then swear to something that was not a fact when you verified this libel?

A. I don't know what the libel is.

Q. Will you just glance at that and tell me whether or not you read it before you verified it, or whether it was read to you? A. That is my signature.

Q. Can you now state whether or not at the time you signed that you had either read this document or had it read to you?

A. My goodness, I don't remember even of signing it, to tell [23—7] the truth about it.

Q. You have no recollection even of signing it?

A. No, I have not.

Q. And if you did sign it you have no recollection of whether you read it or of having it read to you?

A. No, I do not remember reading it at all.

Q. And you have no recollection of its having been read to you? A. No.

Q. And yet you swore you did read it and you

(Testimony of August F. Genecco.)

knew the contents of it?

A. Well, that is my signature.

Q. I call your attention to paragraph IV of the libel containing the recital that the reasonable value of the use of said launch at said time was and is the sum of \$6.00 per day; was that allegation correct?

A. Yes, but just a moment. That is what I always had to pay Mr. E. E. Gross, and that was the cheapest launch I could get at the time; whatever launch I could hire the cheapest and I could get was at \$7.50 per day.

Q. You allege in your libel that the reasonable use and value of that launch to you was \$6.00 per day; was that allegation correct at the time you filed this libel? A. I suppose it must have been.

Q. Well, you know whether it was or was not; was it, as a matter of fact, correct?

A. Well, I suppose it is, but it passed my mind.

Q. Why do you now say that the reasonable value of the use of that launch to you was \$7.50 per day?

A. Because I stopped and figured it over and that is the value to me.

Q. You are more positive about it on a date considerably subsequent to the date of the accident than you were at the time [24—8] you talked this matter over with your counsel and swore to this libel?

A. After considering it and figuring it I find it was \$7.50 per day.

The COURT.—Q. Did you hire any launches?

A. Yes, I hired launches from Mr. Samuel Long. He hauls in these brick barges and tows scow schoon-

(Testimony of August F. Genecco.)

ers; but he could not stay with me there and he towed me down, and when he towed me down the boys would pull me around from one side to the other with a rowboat, and I paid him \$4.00 just to take me down there and back.

Mr. HUDSON.—Q. Did you hire launches all day?

A. No, not all day. I was just towed down and back.

Q. Then, as a matter of fact, of your own knowledge you do not know what the rate per day was for the hire of a launch similar to yours in those waters at that time?

A. When I did hire a launch to take my boat's place I paid \$7.50 a day for it by using it all day—that is, just for the plain launch.

Q. Did you hire a launch similar to yours for the entire day? A. Not at that time.

Q. When? A. I hired one before the accident.

Q. How long before? A. Just about a year.

Q. About a year before? A. Yes, sir.

Q. Do you know anything about what the prevailing rate for hiring launches similar to yours was on or about the 15th day December, 1912?

A. I figured it at that.

Q. You estimated it at a rate you paid a year prior? A. Yes, sir.

Q. You say that at the end of this wharf, I believe you called it, there was a pole with lights on?

A. That is a city light, an electric city light; I believe that is what they call them. [25—9]

(Testimony of August F. Genecco.)

Q. Were you on this wharf on the night of December 15, 1912? A. No, sir.

Q. Do you know whether or not that light was burning on that night? A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Q. How far in from the end of the wharf where this light pole was, was your boat moored?

A. About 75 steps. I just stepped it out, somewhat about 75 steps; it may be a little more. I just took a rough estimate.

Q. With reference to the location of the barge, the launch was stationed where?

A. Alongside, when I seen the damage.

Q. Do you know whether or not your launch had any lights burning and exhibited on it on the night of December 15, 1912?

A. Not that I know of, sir.

Q. To the best of your belief it had no light?

Mr. HUTTON.—His belief does not cut any figure, your Honor; it is a question of fact.

A. I could not say.

Mr. HUDSON.—I am trying to get at his knowledge, as to whether there was a light.

Mr. HUTTON.—And it does not make any difference whether she had a light or not; the law does not require a vessel to carry a light when she is alongside a wharf.

Mr. HUDSON.—There may be a difference of opinion about that.

The COURT.—He says he does not know.

(Testimony of August F. Genecco.)

Mr. HUDSON.—Q. You don't know whether she had a light, or not? A. No, I could not say.

Q. How long after the 15th of December was it you turned your launch over to Mr. Ingersoll to be repaired?

A. Somewhere about three weeks. [26—10]

Q. You had her in your possession about three weeks before you attempted to get her repaired?

A. I had her about three weeks; I could not get no compromise and I was ordered to take her over and have her repaired.

Q. You were ordered by whom?

A. By my attorney, Mr. Hutton.

Q. How long after you delivered it to Mr. Ingersoll was it before it was returned to you?

A. When I received it it was about February 9th, I believe.

Q. During all of that time was it in process or repair?

A. Outside of the time of waiting, about three weeks, before I turned it in.

Q. When were you notified by Mr. Ingersoll first that the launch was ready for delivery to you?

A. I believe it was some time around February 9th. I paid the bill on the same day and it was the day that I paid the bill that I received the launch.

Q. I did not ask you when you received it; I asked you when were you first notified by Mr. Ingersoll that the launch was ready for delivery to you?

A. I believe it was about February 8th, in the evening.

(Testimony of August F. Genecco.)

Q. The day before you got it? A. Yes, sir.

Q. You say you paid Mr. Ingersoll \$441.80?

A. I believe it was 80 cents.

Q. Have you a receipted bill for the amount you paid Mr. Ingersoll?

A. Yes, sir, we have a receipted bill.

Q. Mr. Hutton, will you let me see it?

Mr. HUTTON.—This is only a duplicate (handing).

Mr. HUDSON.—You have not the original receipted bill?

Mr. HUTTON.—That is the only one I have; that is the duplicate. [27—11]

Q. What became of the original receipted bill?

A. I have it at home. That is a duplicate.

Q. Did you copy this from the original?

A. I don't know how that was made out. Mr. Ingersoll brought that down just for a duplicate and turned it over to Mr. Hutton. Mr. Ingersoll is present; he could say whether he copied it, or not.

Q. Mr. Ingersoll is here, is he? A. Yes, sir.

Q. Have you been in the habit of tying this launch up alongside this barge? A. No, sir.

Q. This was the first time you had ever tied it up there? A. That is, to my knowledge.

Redirect Examination.

Mr. HUTTON.—Q. Was there any difference in the value of barges, the use of barges, between December, 1912—I mean launches—and the time you hired that other launch? A. Not that I know of.

(Testimony of August F. Genecco.)

Q. How many launches did you own altogether?

A. One launch.

Recross-examination.

Mr. HUDSON.—Q. How do you know there was no difference in the value of launches—

The COURT.—He says there was no difference that he knew of.

Mr. HUDSON.—I did not get the latter part of the answer, your Honor. That is all.

[Testimony of Manuel Jose, for Libelant.]

MANUEL JOSE, called for the libelant, sworn.

Mr. HUTTON.—Q. What is your business?

A. I am operating Mr. Genecco's launch. [28—

12]

Q. Where do you live? A. I live in Stockton.

Q. Do you know the "Stocktonian," the gasoline launch "Stocktonian"?

A. Yes, sir, I am operating it.

Q. Were you on her on December 15th, 1912?

A. Not at the time she got into the collision with the boat; that is, when the boat smashed alongside.

Q. But you were on her that day?

A. I was. I came on at half-past 5 in the evening, on Saturday afternoon.

Q. What position did you hold?

A. On the launch?

Q. Yes, what job had you?

A. I am the operator; I am the captain and engineer on her.

(Testimony of Manuel Jose.)

Q. Had you been out with the launch and the barge that day?

A. Yes, sir; not on Sunday. I came in on Saturday afternoon at half-past 5 in the evening.

Q. Where did you go with the barge?

A. I came up to my dock, to my berth.

Q. How long had you been in the habit of going to that dock?

A. Every time I came in with a load.

Q. How often did you come in with a load?

A. Most every other day; that is, if I have not got any bad luck, if I cannot get my loads when I am hauling sand.

Q. When you got up to the berth what did you do with the barge and the launch?

A. I tied the barge alongside the wharf, and I tied my launch behind the barge and after I had it tied up the wharfinger hollered at me from across the street,—I did not hear him, but one of the boys said, “The man is hollering at you,” and I said, “What do you want?” and he said, “Get that launch away from there.” I said, “What for?” He said, “That belongs to another man.” I said, “Where am I going to tie my launch?” and he said, “Tie her alongside,” and I tied her alongside.

Q. Alongside the barge?

A. Yes, sir. [29—13]

Q. How long did you stay around there?

A. I stayed there until 6 o'clock.

Q. Then where did you go? A. I went uptown.

Q. How far? A. Just about 3 or 4 blocks.

(Testimony of Manuel Jose.)

Q. What did you go for?

A. I had to get some little things that I needed.

Q. Then what did you do?

A. I came back about 7 o'clock.

Q. When you got back what was the condition of things there?

A. There was nothing that night; that night there was nothing, the night that I got into Stockton nothing happened.

Q. What night was it that the steamer ran into you?

A. Sunday night,—Sunday, December the 15th.

Q. That was the next night? A. The next night.

Q. Did the "Stocktonian" lie alongside of the barge all of Sunday?

A. Yes, sir. That is the only place I could find to tie her, and furthermore, I was ordered to tie her there.

Q. Did the "J. D. Peters" come into Stockton that morning?

A. No, sir, he lay right across from me.

Q. When did she get into Stockton?

A. I think Saturday morning.

Q. Saturday morning?

A. I think so; I am not sure; I don't know the schedule. She don't leave until Sunday night.

Q. Where were you at the time the "Peters" ran into the "Stocktonian," where were you personally?

A. I was uptown.

Q. Was there anybody on the launch that you know of? A. I left the barge pilot on her.

(Testimony of Manuel Jose.)

Q. When the launch is lying alongside of the barge which is the highest out of water, the barge or the launch?

A. It just depends; the cabin of the barge is higher because she lays about 10 feet above the deck, and of course the launch is higher than the main deck of the barge by 2 feet or over.

Q. How far away from the launch was it that the "Peters" was on Sunday? [30—14]

A. Well, just across the channel. The Stockton channel, about twice or three times as wide as this hall. She was lying on one side and I was lying on the other and the channel was open in the center.

Q. Was she there all day Sunday?

A. Yes, sir, until the afternoon, and then she moved up to the other berth to take on passengers.

Q. Your launch was there all day Sunday?

A. Yes, sir.

Q. What time did you go down to the "Stocktonian" on Sunday evening, if you got there at all?

A. About 10 minutes after 6 in the evening.

Q. What was the condition of the "Stocktonian" then? A. She was all staved in.

Q. Did you see the "Peters" around there?

A. The "Peters" was just around the bend, just turning around the lake.

Q. What part of the "Stocktonian" was stove in?

A. The whole cabin and the stern of her. She took the cabin clear off; the cabin was smashed right down, and it caved the stern in that way.

(Testimony of Manuel Jose.)

Q. Any lights around there on the wharf anywhere near?

A. There is a light on the Armory Hall, right across, a little light, and there are those towers about 75 steps away; I stepped off this morning.

Q. How many lights were on the tower?

A. Four of them.

Q. Electric lights or gaslights or what?

A. Electric lights.

Q. Did those lights shine down on where the "Stocktonian" was at the time she was hit?

A. Yes, sir. You can read the letters across the wharf on the wharfinger's place there.

Q. Were the lights burning that night when you got back there the night of the collision?

A. Yes, sir. [31—15]

Cross-examination.

Mr. HUDSON.—Q. What time did you get back there? A. 3 minutes after six.

Q. What time was the collision?

A. About 5 minutes after 6.

Q. You were not there at the time the collision occurred?

A. I was not there; when I got there the boat was just trying to make the turn in the lake.

Q. How long is the "Stocktonian"?

A. The "Stocktonian" is 32 feet long.

Q. Where did you say the "Peters" was lying Sunday? A. Right across from me.

Q. Right across from you?

A. Yes; that is, through the day.

(Testimony of Manuel Jose.)

Q. You are quite positive about that?

A. Yes, sir, I think it was the "Peters" or some other boat.

Q. There was some other boat lying across from you?

A. I am not keeping track of these boats. There was a boat across from me, and the "Peters" generally comes in there on Sunday morning.

Q. Could that have been the "Walker" that was lying across the channel?

A. No, it could not have been the "Walker"; I don't think so.

Q. Would you say it was not the "Walker"?

A. Well, I don't know. I could not say; I thought it was the "Peters." I know the boat moves from there up to the other wharf in the afternoon sometime. Of course, I don't know exactly that it was the "Peters"; I don't know exactly because I am not keeping track of them both.

[Testimony of O. C. Smith, for Libelant.]

O. C. SMITH, called for the libelant, sworn.

Mr. HUTTON.—Q. What is your occupation, Smith? A. A laborer. [32—16]

Q. Where do you live? A. I live in Tracy.

Q. Where is Tracy?

A. About 19 miles this side of Stockton.

Q. Were you working on the "Stocktonian" in December, 1912? A. Yes, sir.

Q. What were you doing on her?

A. We were hauling sand and onions.

Q. Were you on her at the time she came into

(Testimony of O. C. Smith.)

Stockton on the day before she got into collision?

A. Yes, sir.

Q. When you came in what did you do; that is, when you came up the channel with the sand-barge?

A. We tied up to the wharf.

Q. Where did you tie the "Stocktonian"?

A. Behind her.

Q. How long did you stay there?

A. I should judge maybe 5 minutes, or it might have been 10; I don't remember just how long.

Q. Where did you go then? A. On the side.

Q. Did you see a wharfinger around there?

A. I heard a man holler from across and he said, "Take that launch and tie her alongside." I said to the engineer, "What is that fellow hollering about?"

Q. Then you tied her where? A. Alongside.

Q. How long did she stay there?

A. Well, I don't know how long she stayed there.

Q. Was she there the next day? A. Yes, sir.

Q. She lay there all Sunday? A. Yes, sir.

Q. Were you on her at the time the "Peters" ran into her? A. No.

Q. Were you on her at all on Sunday?

A. On Sunday, yes, I was on her after she was smashed up.

Q. Did you see her after she was injured?

A. Yes, sir.

Q. What, if anything, was the matter with her?

A. It knocked the top all off; that is all I know about it.

(Testimony of O. C. Smith.)

Q. When did you see her first after she was injured? [33—17]

A. Well, I should judge about 5 minutes after it was done; she was turning in the channel out there, the boat that backed out up there.

Cross-examination.

Mr. HUDSON.—Q. You say somebody called out to you and told you to take the launch away from the place where you moored her, and to moor her alongside the barge? A. Yes, sir.

Q. Who was it called that out to you?

A. I don't know; I asked the engineer who it was, and the engineer said it was the wharf-boss.

Q. Would you know that gentleman if you were to see him?

A. No, I don't think I would know him.

[Testimony of Ben Real, for Libellant.]

BEN REAL, called for the libellant, sworn.

Mr. HUTTON.—Q. Where do you live?

A. I live in Stockton.

Q. Were you on the "Stocktonian" at the time the "Peters" run into her, in December of last year?

A. Yes, sir.

Q. You were on the vessel at the time?

A. Yes, sir.

Q. Were you on the vessel or on the barge?

A. I was on the barge.

Q. Any lights around there?

A. Only the light that I had in front of the window, right toward the launch. The launch laid about in

(Testimony of Ben Real.)

this position, and the light was right in front, a lantern.

Q. Were there any electric lights around there?

A. Yes, sir.

Q. How close?

A. Well, I should judge about 75 steps, more or less.

Q. With respect to the wharf there where the sand-barge was lying, was the wharf full or was it not full at that time? A. It was full. [34—18]

Q. Was there any other place the "Stocktonian" could lay except where she did?

A. Not handy, that I know of.

Q. Did you hear any conversation the day before that caused the launch to be tied alongside the sand-barge? A. Yes, sir.

Q. What did you hear?

A. I heard a man across the wharf make the remark to the captain to move his launch out of there.

Q. And when he did that, did any vessel take that place? A. Well, not at that time.

Q. Was there later?

A. The butcher; that was the butcher's landing.

Q. She went into where you had been?

A. Yes, sir.

Q. How did the "Peters" come down on the launch at that time? A. It came backwards.

Q. What did she hit the launch with?

A. With her bow.

Q. Did you see anybody on the "Peters"?

(Testimony of Ben Real.)

A. I seen a good many on there; I didn't know any of them.

Q. Where did she back from?

A. She backed from the head of the channel.

Q. How long did you see the "Peters" before she struck you? By the way, how far away was she when you first saw her?

A. I never seen the "Peters" until she hit it first and then I opened the window and I just seen it when it smashed the balance of the "Stocktonian"—the launch.

Q. Did you see the "Peters" before on that day?

A. Sir?

Q. On the day that she hit that launch, did you see the "Peters" before she struck you?

A. I never noticed her.

Q. Did you see her during the forenoon or the afternoon?

A. I did not. There were boats there, but I never paid no attention what boats they were.

Cross-examination.

Mr. HUDSON.—Q. Where did you say you hung this lantern?

A. Right in front of the window. [35—19]

Q. On the launch?

A. No, sir, in the cabin on the barge.

Q. In the cabin on the barge? A. Yes, sir.

Q. Was there any light on the launch?

A. No, sir.

Q. Was there a fence or upper works on this barge

(Testimony of Ben Real.)

to hold the sand or other contents you are carrying as freight?

A. Well, there were boards about 3 feet high.

Q. About 3 feet high around the barge?

A. Yes, sir.

Q. Were they on there on the 15th of December, 1912? A. Yes, sir.

Redirect Examination.

Mr. HUTTON.—Q. Were the boards above the light or the light above the boards?

A. The light was above the boards.

Q. Was the light on the house or was it down on the deck? A. It was inside of the cabin.

Q. How high is the cabin above the deck?

A. Well, I should judge about 12 feet, more or less.

Q. Where were these boards, were they on deck or up around where the cabin was?

A. These boards were around the whole barge.

Q. Down on the deck?

A. They are on there for the purpose of us hauling the sand. They are all around the barge, 3 12-inch planks all around.

Q. That is to keep the sand from falling off?

A. Yes, sir.

Q. And then comes the cabin? A. Yes, sir.

Q. How high is the cabin above the boards?

A. Well, I should judge about 8 or 9 feet, more or less.

Q. Where was the lantern?

A. The lantern was inside of the cabin.

(Testimony of Ben Real.)

Q. How high would the lantern be above the boards?

A. Well, I should judge it would be maybe perhaps 6 or 7 feet more or less, or something like that.

Recross-examination.

Mr. HUDSON.—Q. You say the lantern was inside the cabin of the barge? [36—20]

A. Yes, sir.

Q. Did you have any light displayed on the outside of the barge? A. No, sir.

Q. No light at all? A. No, sir.

Mr. HUTTON.—Q. Was there any window there?

A. Yes.

Q. How near was the lantern to the window?

A. Right against it, almost against, on a wire.

Q. The lantern was inside the cabin, and the cabin has windows? A. Yes, sir.

Q. How many windows did it have?

A. It has four windows.

Q. Where are they?

A. One on each side and two in the front.

Mr. HUDSON.—Q. Did the upper part of this launch project above the top of this 3-foot fence that was around the edge of the barge?

A. Well, I think so.

Q. How much? A. Perhaps a foot or two.

Q. Are you sure it projected at all above the top of that fence? A. I think it would.

Q. You think it would?

A. A little higher than the boards.

[Testimony of G. W. Ingersoll, for Libelant.]

G. W. INGERSOLL, called for the libelant, sworn.

Mr. HUTTON.—Q. What is your occupation, Mr. Ingersoll? A. Boat-builder.

Q. How long have you been in that business?

A. Well, following in steady I have been at it about six years.

Q. Where are you located now?

A. Banner Island Boat Works.

Q. Where were you located in December, 1912, and January and February, 1913?

A. At the same place.

Q. Do you know the launch "Stocktonian"?

A. I do.

Q. Did you do any work on her during January and February, 1913?

A. I don't remember doing any this year; it was last year I did the work on it, I think. [37—21]

Q. Well, you did some work on her, did you?

A. In this year.

The COURT.—This accident occurred in December, 1912, did it not?

Mr. HUDSON.—I think the witness is confused in the date. He must have done the work this year, if he did any.

Mr. HUDSON.—Q. Is that your handwriting (handing)? A. Yes, sir.

Q. Can you refresh your memory as to the dates from that? A. That is right, that is correct.

Q. When was it you did the work? A. 1913.

Q. What month?

(Testimony of G. W. Ingersoll.)

A. I think it was in February.

Q. What was the matter with the "Stocktonian" at the time you took her to do the work on her?

A. The cabin was broke.

Q. Anything else? Just tell the Court in detail what you did to her.

A. I put on a new cabin and a new after-deck, and new carlins and recaulked her in the stern and fixed the clamps.

Q. What was the occasion of that work, what caused it to be done? A. By being broke off.

Q. Did you do any more work than was caused by the injury which you saw, to her?

Mr. HUDSON.—I object to that question as calling for the opinion and conclusion of the witness. He does not know what injuries were done. All he knows is that this boat was brought there and he did certain work; beyond that I submit he should not go.

Mr. HUTTON.—I think that is calling for a question of fact.

The COURT.—The objection is overruled.

Mr. HUTTON.—Q. When you first got her, just tell in detail what was the matter with her. You say the cabin was off and the deck was broke; what else?

A. The cabin was smashed off [38—22] and the clamps were loosened in the stern, and I put on new stanchions and a new cabin complete.

Q. Why did you put them on?

A. I put them on because the man wanted them repaired and put in working order again.

(Testimony of G. W. Ingersoll.)

Q. Did the injuries you saw to the boat cause that stem to be put on? A. Yes, sir.

Q. How about caulking her—you say you caulked her; what caused her to be caulked, why did you caulk her?

A. I caulked her because she was leaking; I had to caulk her in the stern.

Q. Necessary work on account of these injuries?

Q. Did you do any work in or around her at that time except what was necessary and what was caused by the injuries you saw to her? A. No, sir.

Q. What was your bill against her for the work?

A. \$441 and some cents.

Q. Was that a reasonable price for the work at that time and at that place?

A. Yes, sir, I think so.

Q. No overcharge? A. No, sir.

Q. Do you know where the "Stocktonian" lay in Stockton as a rule? A. Yes, sir.

Q. Do you know her berth? A. Yes, sir.

Q. Any lights around there? A. Yes, sir.

Q. What lights? A. Electric lights.

Q. What kind of an electric light?

A. One of these large size, four lights on a pole, about 100 feet high.

Q. Anything intervening between that and where the "Stocktonian" lay? A. No, sir.

Cross-examination.

Mr. HUDSON.—Q. Do you know where the "Stocktonian" lay on the night of December 15th, 1912? A. No, sir. [39—23]

(Testimony of G. W. Ingersoll.)

Q. You don't know where she lay?

A. No, sir.

Q. Do you know whether these electric lights you speak of were burning on that night?

A. I could not swear to it, but the lights burned most all the time there; I never knew them to be out.

Q. You don't know whether they were burning that night, or not, do you? A. No.

Q. And you don't know where the "Stocktonian" lay that night? A. I could not say.

Q. In your opinion what was the value of this launch at the time she was turned over to you for repairs?

A. I think the launch cost some \$800 when I fixed her over, at the time she was brought to me. I fixed her over, that is, when I first built the launch.

Q. \$800? A. Yes, sir, \$800.

Q. My question now is directed to your opinion of her value at the time she was delivered to you in February, 1913, for repairs?

A. Well, I don't know exactly what the value of it was then. I know the boat cost a year or so before, he paid me \$800 for the repair work on the launch, for putting her in running order, without the engine.

Mr. HUTTON.—Q. \$800 for repair work or for the launch? You say he paid \$800 to you a year before that?

A. Yes, sir; Mr. Genecco paid me \$800 to put the launch in first-class shape.

Q. That was for repair work?

A. For repair work, yes, sir. It was a second-

(Testimony of G. W. Ingersoll.)

hand launch brought to me, and I tore it all down and put new planking on it. There was nothing left of the original launch except 3 or 4 ribs and a keel.

The COURT.—Q. How long did it take you to make the repairs caused by the smashing?

A. It took me I think pretty nearly two months; I would not say exactly; I did not keep an exact account of it. We have an account of it in the bill.
[40—24]

Mr. HUTTON.—Q. She was in good shape, then, at the time of the collision or just prior to the collision, was she?

A. I think she was. I could not say for sure. So far as I know she was in good shape because I did Mr. Genecco's work all the time. The year before I built him a barge, and did all his work.

Mr. HUDSON.—Q. How recently had you seen the "Stocktonian" prior to the 15th of December, 1912?

A. Well, I could not say exactly; every month or so he always comes in for some little fixing, or something or other.

Q. Within what period of time prior to the 15th of December, 1912, had you made any examination of the "Stocktonian" for the purpose of determining what condition she was in?

A. I did not make any examination.

Q. Then, as a matter of fact, you do not know whether she was in good seaworthy condition prior to the 15th of December, or not, do you?

A. Nothing more than what I could tell by looking

(Testimony of G. W. Ingersoll.)

at her from a distance.

Q. When was she delivered to you by Mr. Genecco for repair subsequent to the 15th of December?

A. About the 1st of the year.

Q. About the 1st of January? A. Yes, sir.

Q. Is that as close as you can fix the time?

A. Yes, sir; it was somewhere about that time. I did not keep exact account of it in my head. Of course, we had a book account. I cannot bring to my mind exact dates of such things.

Q. Do your records show when she was turned over to you? A. Yes, sir.

Q. Have you those records, or a copy of them, with you? A. No, sir, not any more than that bill.

Mr. HUDSON.—Have you any such records, Mr. Hutton? Have you any records or copies of records kept by this gentleman [41—25] or by his company showing when the launch was turned over for repairs?

Mr. HUTTON.—No. There was some correspondence between your concern and myself personally about it and that took some little time.

Mr. HUDSON.—There is nothing in that correspondence to show the dates.

**[Testimony of Manuel Jose, for Libelant
(Recalled).]**

MANUEL JOSE, recalled for libelant.

Mr. HUTTON.—Q. When you moved the “Stocktonian” away from the side of the wharf to the side of the sand-barge on that Saturday night, was there anything that took your place?

(Testimony of Manuel Jose.)

A. There was a butcher-boat, that came in there a little later.

Q. Was the wharf full then? A. Yes, sir.

Mr. HUTTON.—That is our case, your Honor.

[Testimony of E. S. Lee, for Respondent.]

E. S. LEE, called for the respondent, sworn.

Mr. HUDSON.—Q. Where do you reside, Mr. Lee? A. I live in Stockton.

Q. What is your occupation?

A. Master mariner.

Q. Are you engaged in that occupation at the present time? A. Yes, sir.

Q. A captain in command of any vessel?

A. Captain of the steamer “J. D. Peters.”

Q. Is that the “Peters” that has been referred to in the testimony here? A. Yes, sir.

Q. Were you in command of the steamer “Peters” on the 15th day of December, 1912? **[42—26]**

A. I was.

Q. Will you state to the Court where on the evening of December 15th the steamer “Peters” was lying?

A. She was lying at her depot wharf, at the head of the Stockton channel, about 600 feet above where this accident occurred.

Q. At the head of the Stockton Channel?

A. Yes, sir, on the same side.

Q. What time in the evening of December 15th, 1912, did the steamer “Peters” leave that location?

A. She left at 6 o'clock.

(Testimony of E. S. Lee.)

Q. Bound for where?

A. Bound for San Francisco.

Q. Will you state briefly to the Court what you know in connection with the collision between the steamer "Peters" and this launch, the "Stocktonian" and when you first observed the "Stocktonian," and under what circumstances; just tell the Court briefly what you know about this matter?

A. We left our landing at 6 o'clock and backed down the channel. It was a very dark night, and as we got down close to where this other boat lay I saw this launch, but we were so close to it that we could not avoid running into it.

Q. What is the width of this channel?

A. I believe it is 132 to 135 feet.

Q. Where is the width 135 feet?

A. At the head of the channel.

Q. What is the width of the channel at the spot where the "Stocktonian" was moored to this barge?

A. It is said to be 132 feet here.

Q. What is the practice of the steamer "Peters" in going into this channel, to tie up to her place?

A. She has to go in head up because the channel is so narrow it is impossible to turn around.

Q. Consequently in leaving she had to back out?

A. Yes, sir.

Q. How long has the steamer "Peters" been berthing at this place where she was tied up on the evening of December 15, 1912? [43—27]

A. I think about a year or a year and a half.

Q. You think it has been at least a year?

(Testimony of E. S. Lee.)

A. At least a year.

Q. How many trips a week does the steamer "Peters" make to Stockton and to this berth?

A. We make three trips a week.

Q. And you have been doing that regularly all the time she has been berthing at this place?

A. Yes, sir.

Q. What is the width of the steamer "Peters"?

A. She is 44 feet or 46 feet beam, from guard to guard; I am not exactly sure.

Q. Will you state whether or not at the time of this collision there was moored on the south side of the channel opposite the point where the barge and the "Stocktonian" were moored any other steamer tied up?

A. Yes, sir, the steamer "T. C. Walker," the sister ship to the "Peters," or almost identically the same as the "Peters"; she is about 46 feet beam.

Q. What is the width of this barge, if you know, to which the "Stocktonian" was tied?

A. I would say she was 20 feet or maybe 25 feet wide.

Q. What, if you know, is the width of the launch "Stocktonian"?

A. She ought to be 8 feet beam, I should think, according to her length. They say she is 30 feet.

Q. What was the approximate width of the channel between the "Walker" and the outside of the launch "Stocktonian" at the time the "Peters" passed down the channel?

Mr. HUTTON.—I do not think that is material,

(Testimony of E. S. Lee.)

your Honor. If he could not get out without endangering other people's property he should have stayed there until he had the channel clear.

Mr. HUDSON.—It is simply one of the circumstances, your Honor.

The COURT.—Well, we will take the testimony, but it is [44—28] simply a matter of computation from the figures which he has already given.

Mr. HUDSON.—Of course, I know your Honor will compute the distance in arriving at your decision as to whether or not the steamer did go out there in a proper manner.

The COURT.—We have that fact before us. The channel was 132 feet, and a 44-foot boat on one side and 25 feet and 8 feet on the other.

Mr. HUDSON.—Q. How close were you to the "Stocktonian" at the time you first observed her?

A. I was right up alongside of her, the stern of the boat was.

Q. What portion of the steamer "Peters" came in contact with the launch?

A. The steamer got by until a little aft the forward gangway and it touched there, her guard rode the launch and brushed against her.

Q. What is the guard?

A. The guard is the overhang; it is about a 2 or 3 foot overhang from the hull. The guard went over the launch and broke the house or cabin of the launch.

Q. What speed was the steamer "Peters" making at the time of the collision?

(Testimony of E. S. Lee.)

A. The "Peters" was going down under a slow bell.

Q. By a slow bell you mean what?

A. Half-speed.

Q. Where were you standing at the time you first observed the launch?

A. I was standing on the "Texas" deck, on the port side, the after port-quarter. The after port-quarter is on the port side, aft, anywhere from amidships to stern; I stood pretty close to the stern, on the port side, on the "Texas" deck.

Q. After you first observed the launch there was it possible to avoid colliding with her?

A. No, I think not.

Q. Was there any light on the launch? A. No.

Q. Now Captain, with reference to this electric light that has been spoken of by some of the witnesses on the end of the wharf [45—29] and on the side of the channel, in the position in which the barge and the launch were lying, would that electric light light up and show the launch lying alongside the barge?

A. No. The seawall there is about 12 feet from the surface of the water and the barge and the launch were low, and they lay down in the shadows. This electric light casts deep shadows upon the seawall on that side.

Q. Was the launch lying in the shadow of the barge?

A. Yes, the launch and the barge were both in shadow. The pilot-house of the barge was in the rays of the light. The pilot-house of the barge is a

(Testimony of E. S. Lee.)

little square structure right on the stern of the barge. That might have been up on a level with the wharf. I could not see that.

Q. You could see the top of the pilot-house on the barge?

A. Yes, sir. The hull of the barge lay in the shadow of the seawall and the launch lay in the shadow of both.

Q. By reason of the position which the barge was occupying, and the relative positions of barge and launch, these lights on the pole cast no illumination on the launch, did they?

A. No. The light was a detriment to me.

Q. I show you what purports to be a pencil-drawing and ask you to state what it is.

A. This is a little sketch I made of the channel and the boats as they lay that night.

Q. Showing relative positions and distances?

A. Yes, sir; it shows the distances and the position of my boat when she hit the launch and the barge; the steamer "Walker" lying opposite, and other craft around.

Q. When did you make that, Captain?

A. I made that soon after this occurred, I think within a week.

Mr. HUDSON.—I offer this in evidence as "Respondent's Exhibit" for illustrative purposes and ask that it be marked. [46—30]

Mr. HUTTON.—Of course it is not drawn to scale?

Mr. HUDSON.—No, it is not drawn to scale. It

(Testimony of E. S. Lee.)

is simply to show the relative positions and the width and length of the channel.

The COURT.—Let it go in.

(The document was here marked Respondent's Exhibit "A.")

Cross-examination.

Mr. HUTTON.—Q. Captain, did you go down and look at the channel before you started out that night? A. No, sir.

Q. You just started your boat out from the head of the channel whether there were any obstructions there?

A. When I got up on the stern of my boat, when I start out every evening, I always look down the channel, of course. The channel might be entirely blocked, or there might be something cross-wise, or there might be something landing there just at that time. I always look to see. I looked as usual this night, and I did not see anything in the way, and I gave the signal for the mate to cast loose and we proceeded.

Q. And when you started out from where you had been tied up I suppose you were in the pilot-house, were you not? A. No, sir; I was not.

Q. Who attended to the bells? A. The pilot.

Q. And you communicated to him when to go ahead and when to stop and when to back?

A. Yes, sir.

Q. You did not have any lookout there, did you?

A. A lookout where?

Q. Up on the deck with you.

(Testimony of E. S. Lee.)

A. No, I was the lookout myself. I do not have a lookout when I am there.

Q. You were navigating the vessel and attending to the bells [47—31] and giving the orders to stop and start the vessel?

A. The pilot acts under my supervision; he does what I tell him to do.

Q. You give the orders to him, do you?

A. Yes, sir, I give the orders.

Q. The handling of the vessel was under your supervision and control and orders at that time; is that correct? A. Yes, sir.

Q. You did not have anybody further aft than you on the deck of the "Peters" on that night, as a lookout?

A. No; you could not get much further aft than I was; you would have to get out over the top of the wheel maybe and that is a dangerous place.

Q. The pilot was in the wheel-house up forward, was he not? A. Yes, sir.

Q. Who gave orders as to the steering of the vessel—you?

A. He uses his judgment from what he can see, and if the boat is going too much to port or too much to starboard, I tell him to steady her to port or steady her to starboard; I sing out to him through a megaphone. If the boat is not straight, or if she is going the wrong way, he handles her according to my directions.

Q. You knew there were vessels on both sides of the channel, did you not?

(Testimony of E. S. Lee.)

A. Yes, sir; there are always vessels on both sides of the channel.

Q. Do you know that the "T. C. Walker" went away from that berth that afternoon; do you know whether she did or did not? A. No, I do not.

Q. You don't know whether she moved away or whether she did not?

A. No. She was there when I went out.

Q. Did you ever go aboard the sand-barge?

A. No, I never have been aboard of it; I have been right up alongside of it. [48—32]

Q. Then you cannot tell how wide she was?

A. Just from casual examination, that is all.

Q. You do not know how wide the launch was either, do you?

A. Only from my judgment in looking at her; I have seen the launch a hundred times.

Q. You don't know how long she was?

A. Yes, sir, I know how long she is now. That witness testifies she is 30 feet long, and that is just the estimate I made of her length.

Q. But independent of that you don't know how long she was? A. No, I never measured her.

Q. And you don't know how wide she is?

A. No, not exactly.

Q. You don't know how high she stood above the water; that is, the top of her pilot-house?

A. Not by measurement; she is a very low boat; she is a small boat.

Q. Do you know whether she stood higher than the barge, that is, higher than the deck of the barge above

(Testimony of E. S. Lee.)

the water? A. No, I think not.

Q. Well, you don't know? A. No.

[Testimony of J. J. Banz, for Respondent.]

J. J. BANZ, called for the respondent, sworn.

Mr. HUDSON.—Q. Where do you reside?

A. Stockton.

Q. What is your occupation? A. Ship-joiner.

Q. Ship carpenter and joiner? A. Yes, sir.

Q. How long have you been in that occupation?

A. Off and on for the last 15 or 16 years.

Q. Do you know the launch "Stocktonian" that has been testified about here this morning?

A. Yes, sir.

Q. Did you see her on or about the 15th of December, 1912?

A. I did, after she was disabled. [49—33]

Q. Where did you see her?

A. I saw her on the north side of the channel opposite the navigation company's wharf.

Q. How did you come to see her at that time?

A. Mr. Prior, the manager in Stockton, telephoned to the ship-yard and wanted me to go and take a look at her saying she had been damaged a few days before by some steamer, he did not say exactly which steamer it was, at least not to my recollection.

Q. For what purpose were you requested to make an examination of her? A. In order to repair her.

Q. Did you make an estimate as to the cost of repairing her? A. I made an estimate; yes, sir.

Q. What condition did you find her to be in at the time you examined her?

(Testimony of J. J. Banz.)

Mr. HUTTON.—Your Honor, it would not make any difference what he said to Mr. Prior; that is calling for hearsay.

Mr. HUDSON.—I am not asking him that; I am asking him for the condition of the boat at the time he examined her.

A. I examined the boat and found after looking her over that the cost of repair would be in the neighborhood of \$100.

Q. That was your estimate? A. Yes, sir.

Q. What damage did the boat sustain?

A. There were three windows gone. The roof of the launch was lying inside the launch, that is, a part of it, part of it was fastened to it in the bow and the aft part was lying down inside the launch. There was nothing overboard; everything was lying inside the launch. It pulled about 2 feet I guess from the top part of the house.

Cross-examination.

Mr. HUTTON.—Q. It frequently happens, when you start to repair a job, that you find you have got more work to do than you originally estimated, does it not?

A. It does sometimes, but I looked over her pretty close and found she was not leaking [50—34] and there was nothing remaining on her—on the side, that I could see.

Q. Don't you know her side was smashed in, crushed in and they had to put in some stanchions?

A. I do not.

Q. A large vessel like the "Peters" coming up

(Testimony of J. J. Banz.)

against a vessel like the "Stocktonian" is liable to strain the "Stocktonian," is it not?

A. She is liable to if she hits her in a certain place and strikes her right.

Q. These gasoline launches as a rule are built light, are they not?

A. They are built according to size.

Q. But as a rule they are built of light construction? A. Yes, sir.

Q. In tearing the house off, is it not liable to strain the hull to some extent?

A. Not if you did not strike the hull.

Q. You don't know whether the hull was struck or not, do you? A. I do not.

Q. Who do you work for?

A. I work for the navigation company.

Q. You are in its employ? A. Yes, sir.

Q. And you were in its employ at that time?

A. Yes, sir.

Q. In what capacity?

A. I have charge of the shipyard.

[Testimony of H. Lieginer, for Respondent.]

H. LIEGINER, called for the respondent, sworn.

Mr. HUDSON.—Q. Where do you reside?

A. At Stockton.

Q. What is your occupation?

A. I am Harbor Master.

Q. Harbor Master in the City of Stockton?

A. Yes, sir.

Q. Did you occupy that position on the 15th day of December, 1912? A. Yes, sir.

(Testimony of H. Lieginer.)

Q. Do you know the launch "Stocktonian"?

A. Yes, sir.

Q. Did you see that launch on the 15th day of December, 1912? A. Yes, sir. [51—35]

Q. Where did you first see her on that day?

A. The first time I saw her was at a space that was occupied by the McCormick Company, a butcher company, 40 feet; she was there, and I hollered over to the captain and I said, "You can't use that space, that is McCormick's; you have to get out of there," and so he got out of there and came alongside of the sand barge.

Q. Did you tell anybody on the barge or on the launch, or instruct anybody on the barge or on the launch, or instruct anybody at all, to tie that launch up alongside the barge? A. No, sir, not at all.

Cross-examination.

Mr. HUTTON.—Q. I suppose she had to be tied up—well, no questions.

The COURT.—Q. You say you saw her tied to the barge afterwards? A. Yes, sir.

Q. Did you make any objections? A. No, sir.

[**Testimony of E. S. Lee, for Respondent (Recalled).**]

E. S. LEE, recalled for the respondent.

Mr. HUDSON.—Q. Captain, do you know what portion of the launch "Stocktonian" was struck by the guard, the overhang of the steamer "Peters"?

A. The overhang of the guard of the "Peters" struck the cabin of the launch.

Q. It struck the cabin of the launch?

(Testimony of E. S. Lee.)

A. Yes, sir. The cabin is very light, you know; it does not take much to smash it in.

Q. Did it hit it a direct or a glancing blow?

A. As we slid by it it rubbed against it.

Cross-examination.

Mr. HUTTON.—Q. You could not see underneath the guard, could you? [52—36]

A. Certainly not, when I am up on deck.

Q. Then, as a matter of fact, you do not know of your own knowledge whether the hull of the “Peters” hit the hull of the “Stocktonian” or not, do you?

A. Yes, sir, because the guard did not go in that far; the guard of the “Peters” did not go over the launch that far.

Q. How wide is the guard? A. When I saw—

Q. (Intg.) I did not ask you that; how wide is the guard,—how far does she project from the hull of the “Peters”? A. I should say about 3 feet.

Q. The house on the launch is inside of her hull, is it not? A. Yes, sir, I guess about a foot.

Q. The guard hit the house and knocked the house over; that is correct, is it not? A. Yes.

Q. So the “Peters” was swinging over; is not that correct?

A. No, the “Peters” was not swinging over, she was going by.

Q. She was going by? A. Yes, sir.

Q. The hull of the “Stocktonian” would be underneath the guard of the “Peters”? A. Yes, sir.

Q. How do you know then, Captain, when you could not see underneath the guard, the guard was

(Testimony of E. S. Lee.)

projecting 3 feet wide, how do you know that the hull of the "Peters" did not hit the hull of the launch?

A. Because I went forward and watched it hit to see what damage it did do to the launch.

Q. What is that?

A. I could see we were going alongside pretty close to this launch and I was there to see what was going to happen when she touched.

Q. And you said here a while ago it was a very dark night?

A. We were right up alongside and I was looking directly down on the launch at that time.

Q. You could see her then all right, could you not? [53—37] A. I sure could; yes, sir.

Q. And still she was underneath your guard?

A. No, she was not underneath my guard.

Q. How could she be otherwise?

A. Because we have a guard 3 feet wide and we had only to go a foot in on the launch to hit the house.

A. If the hull of the "Peters" had hit that launch with the weight of the "Peters" she would have sunk her right then and there; she would not stand the weight of the "Peters"; she would have cracked her like an eggshell.

Q. From your own personal knowledge you do not know what damage was done to the "Stocktonian," do you?

A. Oh, yes, I do; she lay alongside the wharf for 2 or 3 weeks, right where she was hit.



(Testimony of E. S. Lee.)

Q. You did not go aboard of her, did you?

A. No, but I went on the wharf and looked at her.

Q. Are you a ship-carpenter?

A. I know something about it.

Q. Did you ever build a gasoline launch?

A. No, I never built one.

Q. You never went alongside of her to see what timbers were sprung, did you?

A. No, it was not necessary because I could examine her from the wharf.

Q. And still you are not a ship-carpenter?

A. No, I am not, but I know something about the construction of boats because I worked in our shipyard; I served a little while in our own shipyard and I know something about the construction of a boat.

Mr. HUDSON.—That is our case. [54—38]

[Testimony of Manuel Jose, for Libelant (Recalled in Rebuttal).]

MANUEL JOSE, called for libelant in rebuttal.

Mr. HUTTON.—Q. Could you see across the channel that night, the night of this collision?

A. Yes, sir; I could read the letters that are printed on the other side.

Q. You could see plainly over on the other side?

A. Yes, sir; whenever them lights are lit I can see across the channel on a dark night and read the letters; the letters are pretty big letters.

Q. Could you see the vessels that are lying up and down the channel? A. Yes, sir.

Q. Any of them as small as your boat?

A. Yes, sir, there were three tied abreast of her;

(Testimony of Manuel Jose.)

they stood out further than my boat did.

Q. How near to your boat?

A. 150 feet, more or less.

Q. Up or down the channel?

A. Up closer to where the "Peters" was; these launches lay all abreast, I think there were four of them. They belonged to Mr. Cross. One of them was as big as our launch, but she did not have as much power. They stuck further out in the middle of the channel than we did.

Q. Does that electric light light up the channel, generally? A. Yes, sir.

Q. Was the hull of the "Stocktonian" strained any by this collision? A. Yes, sir.

Cross-examination.

Mr. HUDSON.—Q. You say you could look across the channel and see the lettering on the other side?

A. Yes, sir, I could do it.

Q. When you are looking right straight across the channel?

A. Yes, sir; the letters that are printed on the warehouse. [55—39]

[Testimony of August Genecco, for Libelant (Recalled in Rebuttal).]

AUGUST GENECCO, recalled in rebuttal.

Mr. HUTTON.—Q. How light is it in that channel generally when that electric light is burning?

Mr. HUDSON.—That is objected to as immaterial, irrelevant and incompetent; it should be confined to the night in question.

(Testimony of August Genecco.)

Mr. HUTTON.—Q. Have you ever been around that channel in the night-time?

The COURT.—The captain testified that these barges lay in the shadow cast by the light, so it has been established that the lights were lit.

Mr. HUTTON.—Q. Over on your side of the channel how light is it when the electric light is burning?

A. The light burns so well, I was on it last night, and last night was considered a very dark night, and cloudy; I was there last night and we pretty near put a full load of sand on to lighten up the load on the barge.

Q. And you had the electric light? A. Yes, sir.

Q. That was done last night?

A. Yes, sir, last night, and it was a cloudy night.

The COURT.—Q. Was the barge lying in the same place?

A. The very same place, the very same berth.

Mr. HUTTON.—Q. When the barge is lying alongside the wharf, and the launch would be alongside the barge, does the barge cast any shadow over the launch—that is, so it could not be seen?

A. I don't see why the launch could not be seen as well as the barge; I don't see where it casts any shadow. The light is plain enough to see the whole works there.

Q. Which stands the highest out of the water?

A. My figures are—I could not say because the barge was about half loaded, and I really could not tell you the measurements; [56—40] I never have

(Testimony of August Genecco.)

given any measurements.

Q. Have you ever seen them alongside of one another?

A. Yes, sir, I have seen them alongside of one another, but I really could not say just how much it does stick over; I would not swear to it; it does some though.

Q. About how do they stand with respect to height out of the water?

A. There is a little difference; I could not say just about how much; there is not such a great deal of difference in the measurements; I never gave it any attention because I did not frequent it so very often.

Q. How wide is the "Stocktonian"?

A. The "Stocktonian" is 7 feet beam, just about 7 feet.

Q. And the barge?

A. 20 feet beam; 20 by 64, I believe.

Cross-examination.

Mr. HUDSON.—Q. Do you know anything about the condition of the lights or the shadows at the slip where this light was located on the night of December 15, 1912? A. No, sir.

Q. You don't know a thing about that, do you?

A. I don't know a thing about it; no, sir.

Mr. HUTTON.—That is all, your Honor.

Mr. HUDSON.—I have some authorities to present to your Honor, which I think will have some important bearing on this case. I would like to present them formally.

Mr. HUTTON.—There are just two points in this

case. It has been held universally that where a man is piloting a vessel and giving commands he is not the man to be on the lookout; they ought to have had a lookout. And secondly, it does not make any difference about where the vessel was lying; if she was not tied, if she were lying motionless, they could not run her down and then come in and say that [57—41] they could not see. Will your Honor give me two days to present the authorities?

The COURT.—You may present your authorities in two days and the other side may have two days; that will be four days in all.

[Endorsed]: Filed Dec. 27, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [58—42]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,373.

AUGUST GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION AND IMPROVE-
MENT CO.,

Defendant.

Opinion.

Upon the facts as shown I am of the opinion that libellant is entitled to judgment for \$441.80, expended

in repairing the launch "Stocktonia" and for \$180.00 for loss of the use of said launch while she was undergoing repairs.

Judgment will, therefore, be entered in favor of libellant for \$621.80, and costs.

December 3d, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 3, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [59]

*In the District of the United States, in and for the
Northern District of California, First Division.*

No. 15,373.

AUGUST GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION AND IMPROVE-
MENT COMPANY, a Corporation,
Defendant.

Decree.

This cause having been heard on the pleadings and proofs, and points and authorities having been served and filed by the respective parties, which were duly considered, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the Court that for and on account of the matters and things set forth in the pleadings, and shown by the proofs herein, that the libellant have and recover from the defendant the sum of six hundred and

twenty-one and 80/100 (\$621.80) dollars, together with interest thereon at the rate of six per cent per annum from the date of this decree, and libellant's costs to be taxed.

Dated December 15th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Dec. 15, 1913. Filed. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [60]

*In the District Court of the United States for the
Northern District of California, First Division.*

ADMIRALTY—No. 15,373.

ARTHUR GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT COMPANY, a Corporation,
Respondent.

Notice of Appeal.

To Arthur Genecco, Libellant, herein, and to H. W. Hutton, Esq., Proctor for Said Libellant, and to W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, First Division:

You, and each of you, will please take notice that the California Navigation & Improvement Company, a corporation, respondent herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the District

Court of the United States, for the Northern District of California, First Division, entered in said cause on the fifteenth day of December, 1913.

Dated December 20, 1913.

METSON, DREW & MacKENZIE,
R. G. HUDSON,

Proctors for Respondent.

Due service of a copy hereof admitted Dec. 20th, 1913.

H. W. HUTTON,
Proctor for Libellant. [61]

[Endorsed]: Filed Dec. 20, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [62]

*In the District of the United States, in and for the
Northern District of California, First Division.*

ADMIRALTY—No. 15,373.

ARTHUR GENECCO,

Plaintiff,

vs.

CALIFORNIA NAVIGATION & IMPROVE-
MENT COMPANY, a Corporation,

Respondent.

Assignment of Errors.

Comes now California Navigation & Improvement Company, a corporation, appellant herein, and assigns as error in the proceedings and decree of the District Court the following:

I.

The District Court erred in finding and deciding

that Arthur Genecco should recover for the cause of action set forth in its libel.

II.

The District Court erred in finding and deciding that it was the duty of the steamer "J. D. Peters," under the circumstances disclosed by the evidence, to keep out of the way of the launch "Stocktonia."

III.

The District Court erred in finding and deciding that the steamer "J. D. Peters" was in fault in colliding with the launch "Stocktonia," under the circumstances disclosed by the evidence.

IV.

The District Court erred in finding and deciding that the "Stocktonia" was the privileged vessel, under the circumstances disclosed by the evidence.
[63]

V.

The District Court erred in finding and deciding that the "Stocktonia" was not in fault under the circumstances disclosed by the evidence.

VI.

The District Court erred in finding and deciding that the collision must be attributed solely to the steamer "J. D. Peters."

VII.

The District Court erred in not finding and deciding that the "Stocktonia" was guilty of negligence which contributed to the collision.

VIII.

The District Court erred in not finding and deciding that the "Stocktonia" was solely in fault for the

collision between the "Stocktonian" and the steamer "J. D. Peters," in that at the time of the collision the "Stocktonia" was not taking ordinary precautions to indicate to other vessels.

IX.

The District Court erred in not finding and deciding that, under the circumstances disclosed by the evidence, it was the duty of the "Stocktonia" to display lights indicating her position in the Stockton Channel.

X.

The District Court erred in not finding and deciding that the "Stocktonia" was solely in fault for the collision with the steamer "J. D. Peters," in that the "Stocktonia" neglected to take the proper precautions to avoid the said or any collision.

XI.

The District Court erred in awarding damages to libellant in the sum of \$621.80. [64]

XII.

The District Court erred in awarding to libellant by its decree interest upon the said sum of \$621.80 from the 15th day of December, 1912, to the date of the decree herein.

Dated San Francisco, California, January 24th, 1914.

METSON, DREW & MacKENZIE,

Proctors for Appellant.

[Endorsed]: Filed Jan. 24, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [65]

*In the District Court of the United States for the
Northern District of California, First Division.*

ADMIRALTY—No. 15,373.

ARTHUR GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION & IMPROVEMENT
COMPANY, a Corporation,

Respondent.

Stipulation and Order Concerning Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED,
by and between the proctors for the respective parties hereunto, that all the exhibits introduced in evidence at the hearing of the above-entitled cause before the above court may be omitted from the apostles on appeal in said cause and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which the same were respectively introduced before said court.

Dated, San Francisco, Cal., Feb. 18, 1914.

METSON, DREW & MacKENZIE,

Proctors for Appellant.

H. W. HUTTON,

Proctor for Respondent.

So ordered.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Feb. 18, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [66]

*In the District Court of the United States for the
Northern District of California, First Division.*

ADMIRALTY—No. 15,373.

ARTHUR GENECCO,

Libellant,

vs.

CALIFORNIA NAVIGATION & IMPROVEMENT
COMPANY, a Corporation,

Respondent.

**Stipulation and Order Extending Time to File
Transcript.**

IT IS HEREBY STIPULATED AND AGREED
that an order of Court may be made herein extending
the time for the preparation of the Apostles on
Appeal in the above-entitled cause, to and including
the 18th day of February, 1914.

H. W. HUTTON,

Proctors for Libellant.

METSON, DREW & MacKENZIE,

Proctors for Respondent.

Dated, January 19, 1914.

So ordered.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jan. 20, 1914, at 12 o'clock M.
W. B. Maling, Clerk. By Francis Krull, Deputy
Clerk. [67]

**[Certificate of Clerk U. S. District Court to
Apostles.]**

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed sixty-seven (67) pages, numbered from 1 to 67, inclusive, with the accompanying exhibit, 1 in number, transmitted under separate cover, contain a full, true and correct transcript of the documents, records, etc., as the same now appear on file and of record in the Clerk's office of said District Court, in the cause entitled August Genecco vs. The California Navigation and Improvement Company, a corporation, numbered 15,373. Said Transcript is made up pursuant to and in accordance with "Praeceptum for Apostles on Appeal" (a copy of which is embodied in said Transcript), and the instructions of R. G. Hudson, Esquire, appearing on behalf of Metson, Drew and MacKenzie, Proctors for Defendants and Appellants.

I further certify that the cost of preparing and certifying to the foregoing Transcript of Appeal is the sum of Thirty-four Dollars and Forty cents (\$34.40), and that the same has been paid to me by proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 18th day of February, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [68]

[Endorsed]: No. 2380. United States Circuit Court of Appeals for the Ninth Circuit. The California Navigation and Improvement Company, a Corporation, Appellant, vs. August Genecco, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed February 18, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Certificate of Clerk U. S. District Court to Respondent's Exhibit "A."]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,373.

AUGUST GENECCO,

Libelant and Appellee,
vs.

THE CALIFORNIA NAVIGATION AND IMPROVEMENT COMPANY, a Corporation,
Defendant and Appellant.

I, W. B. Maling, Clerk of the above-entitled court, do hereby certify that the document attached hereto, being and marked "Respt's. Exhibit No. 'A,' " and known as pencil diagram—Location of Stmr. "Walker" and "Peters," etc.—is an original exhibit introduced at the hearing of the above-entitled cause in said court, and that said exhibit is herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in its original form in accordance with a stipulation of counsel and order of Court, copy of which is embodied in the Transcript of Appeal herewith.

In witness whereof, I have hereunto set my hand and affixed the official seal of said District Court, this 18th day of February, A. D. 1914.

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

π. 15373

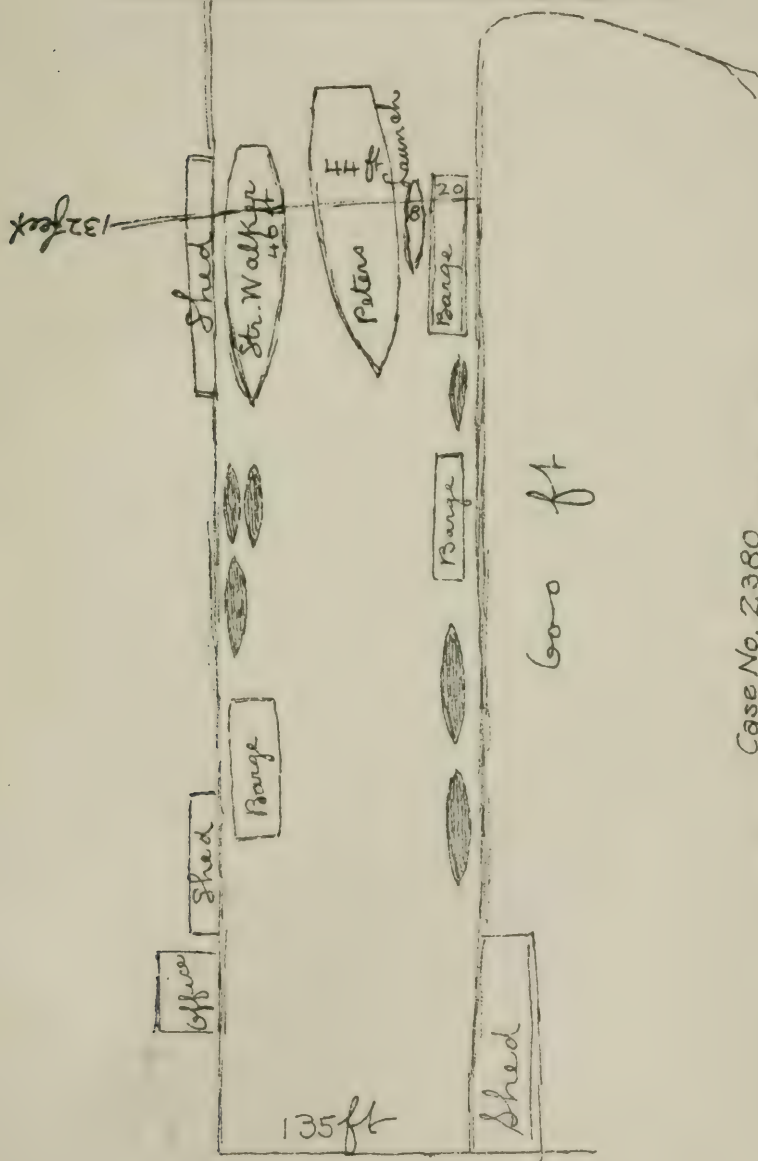
Genesco vs. Cal. Nat. & Imp. Co.

Receipts Exhibit No. A

W. B. Maling Clerk

By Lyle R. Morris,
Deputy Clerk.

Deputy Clerk.



Case No. 2380
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
RESPONDENT'S EXHIBIT 'A'
RECEIVED FEB 18, 1914.
F. D. MONCKTON, Clerk.

